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Reciprocal Concealed Carry: The Constitutional Issues

by WILLIAM D. ARAIZA *

Introduction

With the Supreme Court's continued unwillingness to decide Second Amendment cases after its foundational decisions finding an individual gun possession right¹ and applying that right to the states,² Congress has become the focal point for national gun rights.³ One particularly noteworthy federal legislative initiative would require states that allow any form of concealed weapons carry to honor the concealed carry permits of any other state. In December, 2017, the House of Representatives passed H.R. 38, The Concealed Carry Reciprocity Act of 2017.⁴ That bill would amend the

* Professor of Law, Brooklyn Law School. Thanks to the Center on Gun Violence and Hastings Law School for hosting the conference for which this Article was prepared, and to participants at that conference, in particular Joseph Blocher, Darrell A.H. Miller, and Eric Ruben. Thanks also to Bianca D'Agostaro, Marco Donatelli, Aubria Ralph, and Andrey Udalov for fine research assistance.

1. *District of Columbia v. Heller*, 554 U.S. 570 (2008) (finding that the Second Amendment protects an individual right to possess guns).

2. *McDonald v. City of Chicago*, 541 U.S. 742 (2010) (applying the Second Amendment right to the states, with four justices basing that application on the Fourteenth Amendment's Due Process Clause and one basing it on the Fourteenth Amendment's Privileges and Immunities Clause).

As this Article goes to press, the Court has granted *cert.* on a Second Amendment case involving a New York City ordinance that limits the circumstances under which a gun owner may transport her gun. *See* Petition for Writ of Certiorari Granted, *N.Y. State Rifle & Pistol Ass'n v. City of N.Y.*, No. 18-280, (Jan. 22, 2019).

3. *See, e.g.,* William D. Araiza, *Samuel Alito: Populist*, 103 CORNELL L. REV. ONLINE 101 (2017), for a discussion on the Court's failure to grant review in significant Second Amendment cases after *McDonald*.

4. Concealed Carry Reciprocity Act of 2017, H.R. 38, 115th Cong. (2017). This article will focus on the provisions of this bill. However, one can expect other versions of the bill to be introduced as legislators continue to work for enactment of concealed carry reciprocity. For example, the concept of concealed carry reciprocity was explicitly endorsed in the 2016 Republican Party Platform. *See* [https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL\[1\]-ben_1468872234.pdf](https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL[1]-ben_1468872234.pdf), at 12. For convenience's sake, this Article uses H.R. 38 as the subject of its analysis, even though future legislation may differ from that bill.

federal criminal code to allow individuals to carry a concealed handgun into or possess a concealed handgun in another state that allows individuals to carry concealed firearms.⁵ Thus, a state could still prohibit *any* person (a citizen of that state or a visitor from another) from carrying a concealed weapon; in such a case the bill would have no effect. However, if a state had any provision at all for concealed carry, the bill would require it to honor a concealed carry permit issued by any state, even if the issuing state had more relaxed requirements for holding such a permit.⁶ The bill also prohibits any person thus possessing a concealed weapon from being “arrested or otherwise detained” without “probable cause” to believe he is not complying with the bill’s provisions.⁷ It also provides that “[p]resentation of facially valid documents as specified in subsection (a) [of the bill] is prima facie evidence that the individual has [the requisite state-issued] license or permit.”⁸

The push for reciprocal concealed carry has generated a great deal of publicity, much of it negative. Opponents have portrayed it as allowing the carrying of concealed weapons in Times Square on New Year’s Eve.⁹ While such criticism is inaccurate to the extent New York prohibits concealed carry of any sort, opponents have a point to the extent a state prefers to allow concealed carry but only under very limited circumstances. Moreover, when thinking about the extent to which a state might be willing to allow even limited concealed carry, it bears remembering that it’s at least plausible—and quite possibly the better reading of current law—that a state *must* allow either concealed or open carry in some or most public spaces.¹⁰ Thus, a state that might (understandably) wish to prohibit open carry¹¹ could find itself constitutionally obligated to allow some degree of concealed carry—which in turn would trigger the obligations of the reciprocal concealed carry bill, should it become law. As noted above, that bill would mandate that state to

5. For a brief description of H.R. 38, see *infra* Part I. For a more complete description, see Hannah Shearer, *Jeopardizing ‘Their Communities, Their Safety, and Their Lives’: Forced Concealed Carry Reciprocity’s Threat to Federalism*, 45 HASTINGS CON. L.Q. 429, 439 (2018).

6. See H.R. 38, 115th Cong. § 101 (a) (2017).

7. See *id.* § 101 (c)(1).

8. *Id.* For a more detailed explanation of H.R. 38, see *infra* Part I.

9. See, e.g., *DA Vance On Concealed Carry Reciprocity Act*, CBSLOCAL.COM (Dec. 9, 2017) <https://newyork.cbslocal.com/2017/12/09/da-vance-on-concealed-carry-reciprocity-act-its-ridiculous/> (quoting the Manhattan District Attorney to that effect).

10. See *infra* note 66 (citing case suggesting that the Second Amendment requires some legal method of public carry).

11. See, e.g., Heather Digby Parton, ‘Look at my gun!’ Why NRA’s scary ‘open carry’ craze is not about freedom, SALON (May 7, 2014), https://www.salon.com/2014/05/07/look_at_my_gun_why_nras_scary_open_carry_craze_is_not_about_freedom/ (recounting stories of citizen fright when confronted with a person openly displaying a weapon).

honor all other states' concealed carry permits, regardless of whether those issuing states imposed more lax requirements for obtaining them.

Clearly, then, federal concealed carry reciprocity ("CCR") legislation has important implications for gun rights, gun control, and the balance between state and federal authority to regulate gun possession. Going beyond such policy practicalities, CCR legislation also implicates a complex web of constitutional law doctrine spanning not just the scope of the Second Amendment right but also federalism and the separation of powers.

This Article focuses on both the sources of congressional authority to enact CCR legislation and what it calls the "constitutional defenses" to CCR legislation. Such legislation would have to be grounded either in Congress's power to regulate interstate commerce,¹² its power to enforce the Fourteenth Amendment,¹³ which has been held to incorporate the Second Amendment's individual right to possess a weapon,¹⁴ or its power granted by Article IV's full faith and credit provision.¹⁵ Each of these three sources of congressional power provides at least an argument in favor of Congress's power to enact CCR legislation; however, each of them raises serious constitutional questions. After Part I of this Article introduces the version of CCR legislation it will analyze, Part II considers whether one or more of these sources of congressional power authorizes enactment of CCR legislation;¹⁶ however, with the exception of its discussion of the enforcement power, it does not purport to reach a conclusive answer to the congressional power question.

Instead, this Article assumes that at least one of these sources authorizes enactment of CCR legislation. It then focuses on whether such a law would nevertheless violate one of two affirmative limits on congressional legislation: first, the requirement that federal legislation not "commandeer" state governments, and second, the requirement that Congress not delegate away its legislative power.¹⁷ Part III concludes that there are plausible

12. U.S. CONST. art. I § 8.

13. U.S. CONST. amend. XIV, § 5.

14. See *McDonald v. City of Chicago*, 541 U.S. 742 (2010) (incorporating the Second Amendment, with a four-justice plurality basing that decision on the Due Process Clause and Justice Thomas reaching the same result based on the Privileges and Immunities Clause).

15. U.S. CONST. art. IV § 1.

16. See *infra*. Part II (A) (considering the Commerce Clause basis for CCR legislation); *infra*. Part II (B) (considering the Enforcement Clause basis); *infra*. Part II (C) (considering the full faith and credit basis).

17. As discussed throughout this Article, it is unclear whether the anti-commandeering prohibition applies to all of these sources of federal power. See *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (considering that prohibition's applicability to the enforcement power); see text accompanying *infra* note 152 (considering its applicability to Congress's power under Article IV's full faith and credit guarantee).

arguments that CCR legislation, or parts of it, would violate one or both of these affirmative limitations on congressional power.

I. H.R. 38

Title I of H.R. 38—the Concealed Carry Reciprocity Act of 2017¹⁸—generally requires any state that allows the concealed carriage of a weapon to honor a concealed carry permit issued by any other state.¹⁹ H.R. 38 contains no requirement that an issuing state’s license, in order to be valid in a host state, be granted only on the satisfaction of certain criteria, except that the holder of such a license not be prohibited by federal law from carrying a concealed weapon.²⁰ Thus, for example, under H.R. 38 a person may obtain a concealed carry license from a state that does not impose any requirements for obtaining such a license, and insist on the validity of that license in a state that imposes stringent criteria for obtaining such a license. Indeed, if the issuing state issues permits to non-residents, a citizen of the host state may travel to the issuing state, obtain a license, and travel back to her home state and insist on the license’s validity, even if that home state would have denied her a license under its own criteria. Perhaps importantly, however, any holder of an out-of-state-issued concealed carry permit may use that permit to carry only a gun “that has been shipped or transported in interstate commerce.”²¹ As noted below,²² H.R. 38’s drafters may have inserted this limitation to bring it within the federal power to regulate interstate commerce.

18. *See supra*, text accompanying note 4.

19. Notwithstanding any provision of the law of any State or political subdivision thereof (except as provided in subsection (b)) and subject only to the requirements of this section, a person who is not prohibited by Federal law from possessing, transporting, shipping, or receiving a firearm, who is carrying a valid identification document containing a photograph of the person, and who is carrying a valid license or permit which is issued pursuant to the law of a State and which permits the person to carry a concealed firearm or is entitled to carry a concealed firearm in the State in which the person resides, may possess or carry a concealed handgun (other than a machinegun or destructive device) that has been shipped or transported in interstate or foreign commerce.

H.R. 38, § 101 (a) (a).

Subsection (b), referred to above, allows states to authorize a private person to “prohibit guns on that person’s property, and also allows states to prohibit or restrict the possession of firearms on any State or local government property, installation, building, base, or park.” *Id.* § 101 (a) (b).

20. *See id.*

21. *Id.*

22. *See infra* Part II (A).

The bill also regulates how local law enforcement may respond to a person who produces an out-of-state-issued concealed carry permit. Section 101(a) states:

(c) (1) A person who carries or possesses a concealed handgun in accordance with subsections (a) and (b) may not be arrested or otherwise detained for violation of any law or any rule or regulation of a State or any political subdivision thereof related to the possession, transportation, or carrying of firearms unless there is probable cause to believe that the person is doing so in a manner not provided for by this section. Presentation of facially valid documents as specified in subsection (a) is *prima facie* evidence that the individual has a license or permit as required by this section.²³

As this Article will explain,²⁴ subsection (c), while perhaps intended to allow holders of out-of-state-issued concealed carry permits to fully enjoy the right the bill seeks to provide, raises difficult constitutional questions about federal power to prescribe how local law enforcement goes about its work enforcing concealed carry permit requirements.

II. The Power Issues, Briefly Considered

As noted in the Introduction, three sources of congressional power to enact H.R. 38, and CCR more generally, immediately present themselves: the Article I power to regulate interstate commerce,²⁵ the power to enforce the Fourteenth Amendment, Section 1 of which has been understood to incorporate the Second Amendment,²⁶ and the Article IV power to “prescribe the Manner” in which “public Acts, Records, and judicial Proceedings” to which full faith and credit must be given “shall be proved, and the Effect thereof.”²⁷ Each of these powers presents a facially plausible foundation for CCR. But, as this Part preliminarily sketches out, each presents its own complications and ambiguities.

A. The Commerce Power

At first blush, the commerce power presents a highly plausible constitutional foundation for a CCR law. Even after the last quarter-century

23. H.R. 38, § 101(a)(c).

24. *See infra*. Part III (A).

25. U.S. CONST. art. I § 8.

26. *See* U.S. CONST. amend. XIV, § 5; *McDonald*, 541 U.S. 742.

27. U.S. CONST. art. IV § 1.

of minor cutbacks,²⁸ the commerce power remains broad, and quite capable of justifying federal regulation of completely intrastate conduct as long as that conduct has a substantial effect on interstate commerce.²⁹ The CCR bill, which allows persons possessing an out-of-state concealed carry permit to carry a concealed weapon in a jurisdiction that otherwise allows at least some concealed carry, would at first blush satisfy the substantial effects requirement.

But the matter is cloudier than that. Most foundationally, in *United States v. Lopez*,³⁰ the Court applied more stringent review under the substantial effects requirement because the activity in question was non-economic.³¹ *Lopez*'s analysis is especially pertinent to CCR legislation, since the activity deemed non-economic in *Lopez* was the possession of a gun. In *Lopez*, the Court held that Congress could regulate such non-economic activity under the substantial effects prong of the commerce power only if (1) the regulated activity "is an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated;"³² (2) the statute "contains [a] jurisdictional element which would ensure, through case-by-case inquiry, that the [regulated activity] in question affects interstate commerce;"³³ or (3) Congress provided findings that revealed a link between the regulated activity and interstate commerce.³⁴

In a later case the Court sharply restricted the probative value of congressional findings.³⁵ Moreover, the CCR bill is not "an essential part of a larger regulation of economic activity," unlike, for example, the Controlled Substances Act's (CSA's) ban on local possession of controlled substances,

28. See *National Federation of Indep. Businesses v. Sebelius*, 132 S. Ct. 2566 (2012) (holding that the commerce power did not justify enactment of the Affordable Care Act); *United States v. Morrison*, 529 U.S. 598 (2000) (holding that the commerce power did not justify the Violence Against Women Act); *United States v. Lopez*, 514 U.S. 549 (1995) (holding that the commerce power did not justify the Gun Free Schools Zones Act).

29. See, e.g., *Gonzalez v. Raich*, 545 U.S. 1 (2006) (upholding a federal prosecution for local cultivation and possession of marijuana, under the federal Controlled Substances Act). The commerce power also allows Congress to regulate the channels and instrumentalities of interstate commerce. See *Lopez*, 514 U.S. at 558. The CCR bill likely does not fall under either of these categories, except as a necessary consequence of satisfying the "jurisdictional element" prong of the substantial effects requirement, as described in the text.

30. 514 U.S. 549 (1995).

31. See *id.* at 559–63.

32. *Id.* at 561.

33. *Id.* at 561.

34. See *id.* at 562.

35. See *United States v. Morrison*, 529 U.S. 598 (2000).

which the Court observed was an essential part of the CSA's wide-ranging regulation of interstate trafficking in illicit drugs.³⁶

This leaves the so-called "jurisdictional element" or "jurisdictional hook" element from *Lopez*. Indeed, the CCR bill's drafters appear to have been aware of this mechanism for invoking Congress's commerce power, since they provided for reciprocal concealed carry rights only for guns that had traveled in interstate commerce.³⁷ Thus, the strongest Commerce Clause argument for congressional authority to enact the CCR bill rests on the force of the bill's jurisdictional element.

But the jurisdictional element argument is not a sure-fire winner. First, the Court itself has suggested that insertion of a jurisdictional element does not necessarily guarantee the constitutionality of a federal statute under the Commerce Clause.³⁸ It seems to have understood its own statement as a warning that particular applications of a jurisdictional hook may be so tenuous as to raise constitutional problems. For example, the Court itself gave a limiting interpretation to a federal arson statute that by its terms featured a jurisdictional element via its application only to "any building, vehicle, or other real or personal property used in interstate or foreign commerce."³⁹ In *Jones v. United States*,⁴⁰ the Court rejected application of this law to punish the arson of a private home. It rejected the government's argument that the statute's jurisdictional hook (the "used in interstate or foreign commerce" language) was satisfied because the home was secured by a mortgage from an out-of-state lender, was insured by an out-of-state insurance firm, and received natural gas from out of state. It did so in part because of the traditional rule of lenity governing criminal law;⁴¹ more relevantly for our purposes, however, it relied primarily on the constitutional avoidance canon, citing the constitutional issue it warned would arise under the Commerce Clause were the statute read as broadly as the government urged.⁴² Thus, a jurisdictional hook by itself would not suffice to render any given application of federal law constitutional under the Commerce Clause

36. See *Gonzalez v. Raich*, 545 U.S. 1 (2006).

37. H.R. 38, 115th Cong. § 101(a) (2017).

38. See *Morrison*, 529 U.S. at 612 (a jurisdictional element "may establish that the enactment is in pursuance of Congress' regulation of interstate commerce") (emphasis added).

39. 18 U.S.C. § 844(i) (1986).

40. 529 U.S. 848 (2000).

41. See *Jones*, 529 U.S. at 858.

42. See *id.* at 857–58.

when satisfaction of that hook would threaten the values the Court has found in that clause.⁴³

Some lower courts have also limited the significance of a law's jurisdictional hook when performing Commerce Clause analysis. For example, in *United States v. Patton*,⁴⁴ the Tenth Circuit held that a federal law that prohibited convicted felons from possessing body armor that was sold or offered for sale in interstate commerce failed to satisfy any of the three *Lopez* categories for valid Commerce Clause regulation.⁴⁵ Writing for the panel opinion, Judge McConnell wrote that a "jurisdictional hook is not . . . a talisman that wards off constitutional challenges."⁴⁶ He observed that the jurisdictional hook in the body armor law "does not seriously limit the reach of the statute."⁴⁷ Given that the defendant's possession of the armor was non-economic, intrastate activity, and that the statute was not an essential part of a broader federal scheme of regulation of interstate commerce, he concluded that his possession did not substantially affect interstate commerce.⁴⁸

To be sure, as Judge McConnell explained, a jurisdictional element does influence Clause analysis. He wrote, "the principal practical consequence of a jurisdictional hook is to make a facial constitutional challenge unlikely or impossible, and to direct litigation toward the question of whether, in the particular case, the regulated conduct possesses the requisite connection to interstate commerce."⁴⁹ Following this analysis, the

43. See, e.g., *id.* at 858 (noting the Court's concern in *United States v. Lopez* about federal regulation of subjects traditionally regulated by states, and expressing concern that a broad reading of the federal arson statute would implicate that concern).

44. 451 F.3d 615 (10th Cir. 2006).

45. Nevertheless, the court upheld the felon's conviction under the body armor statute, following pre-*Lopez* Supreme Court precedent that had assumed its constitutionality, even if several lower court decisions after *Lopez* questioned the viability of that assumption. See *id.* at 636 (upholding congressional power to enact the statute under the authority of the pre-*Lopez* precedent); *id.* at 635 (acknowledging lower court uncertainty about the continued viability of that precedent).

46. *Id.* at 632.

47. *Id.* at 633.

A purely nominal jurisdictional requirement, that some entity or object involved in the crime be drawn from interstate commerce, does nothing to prevent the shifting of [the federal/state] balance in favor of the federal government. As has been amply demonstrated, virtually all criminal actions in the United States involve the use of some object that has passed through interstate commerce.

Andrew St. Laurent, *Reconstituting United States v. Lopez: Another Look at Federal Criminal Law*, 31 COLUM.J.L. & SOC. PROBS. 61, 113 (1998).

48. Again, though, the court upheld the defendant's conviction on the strength of the Supreme Court's pre-*Lopez* precedent assuming the statute's constitutionality. See *supra* text accompanying note 45.

49. *Patton*, 451 F.3d at 633.

existence of a jurisdictional hook in the reciprocal concealed carry bill would likely shift the focus of Commerce Clause analysis to individual instances of persons seeking to use an issuing state's concealed carry permit in a host state, using a gun that had moved in interstate commerce at some point.

When so presented, the question becomes the strength of the interstate commerce connection to the particular gun that particular permit holder wished to carry. Suppose, for example, that a holder of a Nevada concealed carry permit traveled to California and sought to carry a gun that had moved in interstate commerce fifty years earlier. In *Patton*, Judge McConnell dismissed the limiting effect of the body armor statute's jurisdictional hook—that is, the statute's requirement that the armor the felon could not possess have been “sold or offered for sale, in interstate or foreign commerce.”⁵⁰ In evaluating whether that provision meaningfully limited the law's scope, he used language that could easily translate into the CCR context: “Nearly all body armor will meet that test. More important, there is no reason to think that possession of body armor that satisfies the jurisdictional hook has any greater effect on interstate commerce than possession of any other body armor.”⁵¹

As suggested by the example above, much the same could be said of H.R. 38's jurisdictional hook. Except for guns that were actually manufactured in the host state and that never crossed a state boundary, any gun that a permit holder might wish to carry in a host state would satisfy the bill's requirement.⁵² Cases such as *Patton* suggest that such attenuated connections to interstate commerce might not suffice to create the substantial effects *Lopez* requires to justify federal regulation of that particular instance of concealed carry.

These are, admittedly, difficult arguments to embrace by those who favor strong federal regulatory power. Calling for courts to scrutinize jurisdictional hooks more carefully, as Judge McConnell did in *Patton*,⁵³ might call into question a whole range of federal laws, particularly environmental laws, that regulate local activities if they are found to have

50. *Patton*, 451 F.3d at 633 (quoting 18 U.S.C. § 921(a)(35)).

51. *Id.*

52. *Cf.* St. Laurent, *supra* note 47 (noting the ubiquity in criminal conduct of materials that at some point had crossed state lines).

53. Notably, while Judge McConnell concluded that there was no “rational basis” for concluding that possession of the body armor the statute regulated substantially affected interstate commerce, he appears to have applied more searching scrutiny than that normally associated with rational basis review. *Patton*, 451 F.3d at 634. *See id.* at 633 (“Where Congress has chosen to allow production, distribution, and sale of body armor in interstate commerce, however, it is hard to understand why possession of armor that [moves in interstate commerce] is more objectionable than any other.”).

some connection to interstate commerce.⁵⁴ The challenge this possibility poses to advocates of both federal power and reasonable gun regulation echoes the analogous challenge pro-choice advocates faced when deciding whether to challenge the federal partial-birth abortion ban on Commerce Clause grounds.⁵⁵ Indeed, that concern might increase when one encounters not just Judge McConnell's (and others') concern about any jurisdictional hook's broad sweep, but also, in turn, the policy skepticism that breadth inspired him to express.⁵⁶ Given that standing to challenge a CCR law would likely be limited to states seeking to resist having to honor out-of-state concealed carry permits, the state attorneys general who would have to craft the arguments would likely confront the broader political and jurisprudential concerns of embracing a broad argument against federal regulatory power. Thus, the concern about embracing an argument that might create undesirable consequences in other contexts would be a real one, felt by those who would be responsible for bringing the legal challenge in the first place.

B. The Enforcement Power

Another seemingly obvious source for Congress's power to enact CCR legislation is its power to enforce the Second Amendment, as incorporated to apply against the states via the Fourteenth Amendment.⁵⁷ However, extant Second Amendment doctrine, to which a CCR bill must be substantively related in order to constitute valid enforcement legislation, raises doubts about such a bill's Enforcement Clause foundation. Even more glaringly, so does the very nature of the right CCR legislation would confer.

54. On the other hand, it might be possible to distinguish away more stringent applications of the jurisdictional element prong when considering challenges to environmental statutes, if in such challenges the identification of particular instances of the regulated activity is more difficult given the interconnected nature of ecosystems, species populations, and airsheds and watersheds. *See, e.g.*, *GDF Realty Investments, Ltd. v. Norton*, 326 F.3d 622, 640 (5th Cir. 2003) ("Although . . . there is no express jurisdictional element in [the Endangered Species Act's [ESA's] prohibition on takings of endangered species], our analysis of the interdependence of species compels the conclusion that regulated takes under ESA do affect interstate commerce."). *Cf.* *National Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1049 (D.C. Cir.1997), *cert denied*, 524 U.S. 937 (1998) ("A class of activities can substantially affect interstate commerce regardless of whether the activity at issue—in this case the taking of endangered species—is commercial or noncommercial.").

55. *See, e.g.*, Jordan Goldberg, *The Commerce Clause and Federal Abortion Law: Why Progressives Might Be Tempted to Embrace Federalism*, 75 *FORDHAM L. REV.* 301 (2006) (setting forth this challenge).

56. *Patton*, 451 F.3d at 633 ("More important [than the broad sweep of the body armor statute's jurisdictional hook], there is no reason to think that possession of body armor that satisfies the jurisdictional hook has any greater effect on interstate commerce than possession of any other body armor.").

57. *See McDonald v. City of Chicago*, 541 U.S. 742 (2010).

1. Judicial Doctrine

The first—and, to date, essentially the only⁵⁸—place to look for Supreme Court doctrine on the scope of the Second Amendment right is its 2008 decision in *District of Columbia v. Heller*.⁵⁹ As readers will know, *Heller* held that the Second Amendment guaranteed an individual right to firearm possession, rather than a collective right grounded in militia service. The five-justice majority, speaking through Justice Scalia, relied heavily on originalist methodology to reach this decision (as did Justice Stevens’ dissent, which also used historical materials to reach the opposite conclusion).⁶⁰

In the course of reaching that conclusion, the majority opinion made several remarks suggesting that the Second Amendment right does not include a right to concealed carry. When reviewing Nineteenth century decisions construing state constitutional analogues to the Second Amendment, the Court cited several such decisions that upheld bans on concealed carry.⁶¹ Indeed, Justice Scalia’s use of the concealed carry issue to illustrate his more general point that, “[l]ike most rights, the right secured by the Second Amendment is not unlimited”⁶² comes very close to a statement that the Second Amendment does not guarantee a right to concealed carry,⁶³ even if the Court did not actually say it.⁶⁴

58. The only other Second Amendment cases the Court has decided since deciding that the Amendment guarantees an individual right to possess firearms are *McDonald*, which simply incorporated the Second Amendment right as set forth in *Heller* to apply against the states via the Fourteenth Amendment, and *Caetano v. Massachusetts*, 136 S.Ct. 1027 (2016), which rejected a state court’s conclusion that a stun gun was not covered by the Second Amendment. *Caetano* does add something to Supreme Court firearms rights doctrine, and is discussed later. See *infra* text accompanying notes 80-82. But See Petition for Writ of Certiorari Granted, N.Y. State Rifle & Pistol Ass’n v. City of N.Y., No. 18-280, (Jan. 22, 2019).

59. *District of Columbia v. Heller*, 554 U.S. 570 (2008).

60. See generally Lawrence B. Solum, *District of Columbia v. Heller and Originalism*, 103 NW. U. L. REV. 923 (2009) (discussing this aspect of the opinions in *Heller*).

61. See *Heller*, 554 U.S. at 613 (discussing *Aymette v. State*, 21 Tenn. 154 (1840)); *id.* at 626 (citing *State v. Chandler*, 5 La. Ann. 3858 (La. 1858) and *Nunn v. State*, 1 Ga. 243 (1846)); *id.* (concluding that “the majority of the 19th-century courts to consider the question held that prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues”).

62. *Id.* at 626.

63. See, e.g., Jonathan Meltzer, *Open Carry For All: Heller and Our Nineteenth Century Second Amendment*, 123 YALE L.J. 1486, 1995 (describing this statement as “about as close as dictum can get”).

64. See *Heller*, 554 U.S. at 626 (by contrast, the Court did say that restrictions on certain types of persons possessing firearms, possession of firearms in certain locations, and restrictions on firearms sales, were constitutional).

Several lower courts have read *Heller* and the history upon which it relied to warrant a conclusion that, indeed, the Second Amendment does not confer a right to concealed carry.⁶⁵ However, this reading creates a problem when one considers the relationship between concealed carry and public carry. Assuming, as *Heller* seems to imply, that there may be some right to public carriage of a weapon,⁶⁶ that carriage must take the form of either open carry (that is, the open display of a firearm on one's person) or concealed carry. Given *Heller*'s apparent approval of restrictions and even bans on concealed carry,⁶⁷ it follows that if, as *Heller* also implies, the Second Amendment protects some measure of public carry, that carry must be public if the jurisdiction chooses to ban concealed carry.

To be sure, many jurisdictions, if required to choose, would probably choose to allow concealed rather than open carry.⁶⁸ This choice would be relevant for the effective reach of a CCR law, since the reciprocal concealed carry right would only apply in jurisdictions that allowed some measure of concealed carry. For Second Amendment enforcement purposes, however, the more formalistic fact would be the relevant one: the Second Amendment does not appear to grant to a right to concealed carry per se.

2. Congressional Enforcement Power

In other writing I have considered the general question of Congress's power to enforce the Second Amendment.⁶⁹ To briefly summarize a complicated question, any such enforcement legislation must satisfy the "congruence and proportionality" standard set forth in the now-foundational 1997 case *City of Boerne v. Flores*.⁷⁰ *Boerne* and the major enforcement power cases that came after it⁷¹ stated and applied a requirement that

65. *E.g.*, *Peruta v. County of San Diego* 824 F.3d 919, 939 (9th Cir. 2016) (*en banc*) (citing other courts reaching the same conclusion); *Petersen v. Martinez*, 707 F.3d 1197, 1211 (10th Cir. 2013) (same).

66. *See, e.g.*, *Peruta v. County of San Diego*, 742 F.3d 1144, 1152–53 (9th Cir. 2014) (observing that since *Heller* spoke of home possession as the "core" Second Amendment right, there must necessarily be a "non-core" right to public possession), *rev'd*, 824 F.3d 919 (9th Cir. 2016) (*en banc*); *id.* at 1153 (arguing that *Heller*'s statement about the presumptive constitutionality of firearms possession restrictions in certain sensitive public places implies that public possession of guns in non-sensitive places is constitutionally protected at least to some degree).

67. *See supra* cases cited note 61.

68. *See, e.g.*, *supra* note 11 (explaining why jurisdictions may make this choice by illustrating the public fear that accompanies instances of open carry).

69. *See* William D. Araiza, *Arming the Second Amendment—And Enforcing the Fourteenth*, 74 WASH. & LEE L. REV. 1801 (2017) [hereinafter Araiza, *Arming*].

70. 521 U.S. 507 (1997).

71. *See* *Florida Prepaid Post-Secondary Savings Plan v. College Savings Bank*, 527 U.S. 666 (1999) (striking down a patent rights law's application to state infringers as exceeding the

enforcement legislation reflect some non-trivial relationship to the underlying Fourteenth Amendment right the legislation sought to enforce.⁷² In applying that requirement, which *Boerne* expressed through its “congruence and proportionality” formula, the Court has relied heavily on judicial decisions in Fourteenth Amendment cases as creating the focal point for congruence and proportionality review. In addition, the Court has often insisted that enforcement legislation closely track the contours of the right announced in those decisions.⁷³ In other writing I have criticized this approach to congruence and proportionality review.⁷⁴ In that writing, I argue that such review should use as its focal point underlying constitutional meaning rather than judicial doctrine, since judicial doctrine may reflect

enforcement power); *Kimel v. Board of Trustees*, 528 U.S. 62 (2000) (holding that the enforcement power did not give Congress the power to apply the Age Discrimination in Employment Act to state government employers); *Board of Trustees v. Garrett*, 531 U.S. 356 (2001) (holding that the enforcement power did not give Congress the power to apply the employment provisions of the Americans With Disabilities Act to state government employers); *Nevada Dept. of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (upholding application of the family leave provisions of the Family and Medical Leave Act to state government employers under the enforcement power); *Tennessee v. Lane*, 541 U.S. 509 (2004) (upholding application of the public services provisions of the Americans With Disabilities Act to states as applied to the right to access courthouses); *Coleman v. Court of Appeals of Maryland*, 132 S. Ct. 1327 (2012) (holding that the enforcement power did not give Congress the power to apply the personal leave provisions of the Family and Medical Leave Act to state government employers); *see also* *United States v. Georgia*, 546 U.S. 151 (2006) (upholding application of the public services provisions of the Americans With Disabilities Act under the enforcement power, as applied to claims made by a state prisoner that the state’s alleged conduct violating the ADA also violated his rights under the Eighth Amendment); *Shelby County v. Holder*, 570 U.S. 529 (2013) (holding that Congress’s power to enforce the Fifteenth Amendment did not authorize it to re-authorize the preclearance provisions of the Voting Rights Act).

72. At least one commenter views *Boerne* as providing significantly more leeway for enforcement legislation, including CCR legislation. *National Right-to-Carry Reciprocity Act of 2011: Hearings Before the United States House of Representatives Subcomm. on Crime, Terrorism, and Homeland Security, Of the Comm. on the Judiciary*, 112th Cong., 11–12 (2011) (Testimony of David B. Kopel, Adjunct Professor, Denver University Sturm College of the Law) [hereinafter Kopel Testimony]. Even assuming this analysis reflects a correct reading of *Boerne*—something that is difficult to evaluate given its brief analysis of a complex case—it neglects to consider post-*Boerne* cases that have usually applied congruence and proportionality review significantly more stringently. *See supra* cases cited note 71 and *infra* sources cited note 73.

73. *See* Robert C. Post & Reva B. Siegel, *Protecting the Constitution from the People: Juricentric Restrictions on Section Five Power*, 78 IND. L.J. 1 (2003) (illustrating examples of such stringent enforcement power scrutiny); William D. Araiza, *New Groups and Old Doctrine: Rethinking Congressional Power to Enforce the Equal Protection Clause*, 37 FLA. STATE L. REV. 451, 466–68 (2010) [hereinafter Araiza, *New Groups*]; WILLIAM D. ARAIZA, ENFORCING THE EQUAL PROTECTION CLAUSE: CONGRESSIONAL POWER, JUDICIAL DOCTRINE, AND CONSTITUTIONAL LAW 114–117 (NYU PRESS 2016) [hereinafter ARAIZA, ENFORCING] (all same).

74. *See* Araiza, *New Groups*, *supra* note 73; ARAIZA, ENFORCING, *supra* note 73; William D. Araiza, *The Section 5 Power and the Rational Basis Standard of Equal Protection*, 79 TULANE L. REV. 519 (2005); William D. Araiza, *The Enforcement Power in Crisis*, 18 U. PA. J. CON. L. ONLINE 1 (2015).

institutional competence and democratic legitimacy concerns specific to courts that have no proper place in evaluating congressional work-product enacted under the enforcement power.

How would congruence and proportionality review, as practiced by the Court, play out with regard to CCR legislation? Would such review, as I argue it *should* be practiced, yield a different result? The answer to the first of these questions—the more practically relevant one—casts doubt on the enforcement power *bona fides* of such a law. So does the second.

Analysis of this first question—that is, whether a CCR law would be congruent and proportional to the Second Amendment right under the Court’s current approach to congruence and proportionality review—is immediately plagued by the oddity of the right a CCR law would confer. Such a law would, by its terms, simply mandate nationwide reciprocal validity of any concealed carry permit issued by any state.⁷⁵ It would not enact any substantive federal concealed carry policy,⁷⁶ or set any federal standards for the kinds of concealed carry permits issued by one state that the other 49 states would have to respect. In a real way, the CCR bill sets no substantive federal gun policy at all.⁷⁷

This lack of a substantive federal gun rights policy, in the context of a putative enforcement statute, “confounds”⁷⁸ conventional congruence and proportionality analysis. The bill’s lack of such a policy makes it impossible to perform the comparative measuring task—that is, the measuring of the law for “congruence” and “proportionality” to the right the law sought to enforce—that is central to *Boerne*’s approach.⁷⁹ As such, it simply cannot be understood as appropriate legislation under *Boerne*’s approach.

This conclusion would hold even if it were shown that states were engaging in serious violations of the Second Amendment right as the Court understood it.⁸⁰ For example, *Heller* at least implies that the Second Amendment might provide some protection for self-defense-justified

75. This statement slightly overstates the effect of the CCR bill, as it requires that any such permit-carrier not be otherwise prohibited by federal law from possessing a concealed weapon. *See* H.R. 38, § 101 (a) (a).

76. *But see supra* note 75.

77. *See generally infra* Part III (B) (arguing that the CCR bill would violate the non-delegation doctrine, in part based on this lack of substantive standards).

78. *Cf. Romer v. Evans*, 517 U.S. 620, 633 (1996) (concluding that a provision of the Colorado Constitution denying any protected status on the basis of same-sex or bisexual orientation “confounds” traditional equal protection review by being simultaneously too broad and too narrow, and thus making it impossible for the Court to test it for compliance with the foundational requirement that all laws have at least a rational connection to a legitimate government interest).

79. *Id.* (identifying an analogous problem with a similarly-unusual statute).

80. *Cf. Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (holding that Massachusetts’ law banning most possessions of stun guns violated the Second Amendment).

possessions of guns in public, both by describing the home as the place where the “core” Second Amendment was “most acute” (thus suggesting other locations where the need might exist, even if in a “less acute” form)⁸¹ and by its endorsement of prohibitions on carrying guns in certain “sensitive places,” thus suggesting that other, “less sensitive,” places might be venues for constitutionally-protected carriage.⁸² Yet the CCR bill would provide no substantive protection for public concealed carriage of a gun, other than whatever protection a given state may choose to provide, which would then become close to a *de facto* national standard via the reciprocity requirement.⁸³

To be sure, one can speculate about the likely effects of a CCR law on the substantive landscape of concealed carry rights in the United States. For example, one might examine particularly permissive jurisdictions today and use their concealed carry rules as the relevant enforcement statute input into the congruence and proportionality calculus. Such speculation, however, is just that—speculation. For example, we could not know whether, in face of nationwide reciprocity, such permissive jurisdictions would take steps to limit the availability of concealed carry permits to their own citizens. But even were we to know with precision the concealed carry policies states eventually adopted in the face of a CCR law, the more important objection to that entire line of enforcement power analysis is that that enforcement statute itself would not be the source of any such policy.

This should be enough to rebut the enforcement power argument. But if it were not, it bears realizing that an enforcement power argument for the

81. See, e.g., *Peruta v. County of San Diego*, 742 F.3d 1144 (9th Cir. 2014) (“The [*Heller*] Court . . . clarif[i]ed that the need for the [firearm possession for self-defense] right is “most acute” in the home, thus implying that the right exists outside the home, though the need is not always as “acute.”); *id.* (concluding that such statements from *Heller*, though short of dispositive, strongly suggest that the Second Amendment secures a right to carry a firearm in some fashion outside the home).

82. See *supra* text accompanying note 66 (citing an appellate opinion adopting this reasoning). One might read *Caetano* as more explicit support for the proposition that gun rights extend into the public, given that the individual in that case was arrested for possessing a stun gun in public). See *Caetano*, 136 S. Ct. at 1028, 1028 (Alito, J., concurring in the judgment) (recounting the facts of the case). However, because the state court had simply categorically excluded stun guns from Second Amendment protection in upholding a state law completely prohibiting their possession, the Court did not reach the public possession question).

83. To be sure, a quite permissive concealed carry state may restrict the availability of concealed carry permits to its own citizens, thus avoiding becoming the desired venue for obtaining such permits nationwide and thus the source for the *de facto* national standard. But a state would be under no obligation to impose such limits, and under the CCR bill every other state that allowed some form of concealed carry would have to honor that issuing state’s permits, even if the holder of the permit possesses the gun in her home state and would not have qualified for a permit under her home state’s law. See *Shearer*, *supra* note 5, at 433 (noting this point).

CCR bill turns the Enforcement Clause on its head. The enforcement power is a federal power designed to empower Congress to ensure that states act in conformance with the Fourteenth Amendment. An enforcement statute that delegated to the states themselves the power to determine what the Second Amendment demands violates that underlying understanding of what the Enforcement Clause, and more generally the Fourteenth Amendment, sought to accomplish.⁸⁴ Indeed, the reciprocity feature that is central to CCR legislation renders the headstand even starker, since it effectively allows one or a small number of states to determine what the Fourteenth Amendment requires and to impose that understanding on the other states.⁸⁵

This analysis applies regardless of whether the Court applies its standard approach to *Boerne*—one that gives dominant effect to its own court-announced doctrine when establishing the constitutional target at which enforcement legislation must aim⁸⁶—or whether it adopts a more nuanced approach.⁸⁷ A more nuanced approach would recognize that court-announced constitutional doctrine may reflect underenforcement of the relevant constitutional provision, due to epistemic anxieties the Court may have or simply a respect for states' democratic political processes.⁸⁸ This recognition in turn might justify a broader congressional role in enacting enforcement legislation, given Congress's equal—and, indeed, broader—democratic pedigree as compared to state legislatures, and its superior fact-finding capabilities as compared to federal courts.⁸⁹

84. What appellant ignores is that Congress, unlike any State or political subdivision, has a specific constitutional mandate to enforce the dictates of the Fourteenth Amendment. The power to 'enforce' may at times also include the power to define situations which Congress determines threaten principles of equality and to adopt prophylactic rules to deal with those situations.

Cf. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 490 (1989) (plurality opinion); *see also* *Ex parte Virginia*, 100 U.S. 339, 345 (1880) (The Thirteenth and Fourteenth Amendments "were intended to be, what they really are, limitations of the powers of the States and enlargements of the power of Congress.").

85. *See supra* note 83 (explaining how a CCR law could lead to that result).

86. *See* ARAIZA, ENFORCING, *supra* note 73, at 113–23 (explaining the Court's standard approach to congruence and proportionality review).

87. *See* ARAIZA, ENFORCING, *supra* note 73 at 141–206 (explaining and arguing for a more nuanced approach to congruence and proportionality review).

88. *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (classic statement of the idea that judicial doctrine may be properly understood as not stating the full extent of constitutional rights).

89. *See* ARAIZA, ENFORCING, *supra* note 73, at 169–93; William D. Araiza, *Deference to Congressional Fact-Finding in Rights-Enforcing and Rights-Limiting Legislation*, 88 N.Y.U. L. REV. 878 (2013); Caitlin Borgmann, *Appellate Review of Social Facts in Constitutional Rights Cases*, 101 CALIF. L. REV. 1185 (2013); Eric Berger, *Deference Determinations and Stealth Constitutional Decision-Making*, 98 IOWA L. REV. 465 (2013).

But even under this more nuanced approach to the enforcement power, CCR legislation would flounder because of the lack of a substantive standard in that law. Simply put, any application of congruence and proportionality review requires that the enforcement statute feature a substantive policy, in order for it to be subject to coherent testing against the constitutional baseline, however court-centric (or not) that baseline is.⁹⁰ CCR legislation simply lacks such a substantive policy. As such, it cannot be considered legitimate enforcement legislation.⁹¹

There is much more to say about Congress's authority to enforce the Second Amendment.⁹² The question is important: the gun rights issue elicits strong feelings on both sides of the debate, and the two sides map neatly onto the nation's current sharp geographical/political divide. This means that there exist simultaneously different gun regulation regimes across the nation⁹³ and strong impetus toward enacting national legislation, a logical foundation for at least some of which would be the enforcement power. Thus, it behooves scholars to continue thinking about the enforcement power

90. See *supra* notes 86-87 (citing sources explaining, respectively, more and less court-centered approaches to congruence and proportionality review).

91. The argument that CCR legislation could somehow be thought of as enforcing the Fourteenth Amendment right to travel requires little discussion. As stated by one proponent of this theory, the theory would be that Congress could decide to protect the right to interstate travel by making it safer by allowing out-of-state travelers to possess weapons pursuant to their home states' laws. See Kopel Testimony, *supra* note 72, at 5-6.

Whether the right in question is a right to travel interstate without encountering "unreasonable" state-imposed burdens, or, alternatively, a right to sojourn in a state free from any unreasonable discrimination based on the visitor's out-of-state status, see Kopel Testimony, *supra* note 72 at 5-6; it is close to impossible to see how giving the visitor a *special* right—a right to carry a weapon pursuant to his home state's laws, rather than simply the right to carry a weapon pursuant to the laws of the state he visits—constitutes an "appropriate," U.S. CONST. amend. 14 § 5, enforcement of that right. Leave aside the seemingly obvious doctrinal objections to calling "unreasonable" or "discriminatory" a state gun law that otherwise complied with the Second Amendment (as the host state's law would have to be assumed to do) and imposed the same requirements on resident and visitor alike. Rather, consider the implications. If a CCR statute was held to be appropriate enforcement legislation enforcing this right, query, for example, whether Congress could also enforce the interstate travel right by mandating that a visitor from a state with a highly protective "stand your ground" law could assert that right when traveling in a state with a less protective law. The highly likely answer to that latter question—an emphatic "no"—would presumably require the same result for a right-to-travel enforcement defense of CCR legislation.

92. See, e.g., Araiza, *Arming* *supra* note 69; Christopher Schmidt, *Originalism and Congressional Power to Enforce the Fourteenth Amendment*, 75 WASH. & LEE L. REV. 33 (2018) (responding to that article); Darrell A. H. Miller, *Dignity and Second Amendment Enforcement—Response to William D. Araiza's Arming the Second Amendment and Enforcing the Fourteenth*, 75 WASH. & LEE L. REV. 438 (2018) (same).

93. To be sure, *Heller* and *McDonald* together mean that these different regimes are all subject to a federal constitutional floor, which mitigates at least some of the divergence noted in the text.

in the context of the Second Amendment. The legitimate scope of that power poses a difficult question. However, the status of a CCR law as Second Amendment enforcement legislation does not.

C. The Full Faith and Credit Guarantee

A final potential source of constitutional authority for Congress to enact CCR legislation is its power under the Full Faith and Credit guarantee of Article IV, Section 1.⁹⁴ As a general matter, that provision speaks to the effect sister states must give to a state's official pronouncements and decisions. Given the gist of CCR legislation as designed to force states to honor another state's concealed carry permits, one can easily understand why this provision—and, in particular, Congress's powers under it—have been cited as a possible source of authority for such a law.⁹⁵

While the first sentence of Section 1, the so-called “Full Faith and Credit” Clause, prescribes a self-executing rule, the provision's relevance for CCR legislation lies in its second sentence, known as the “Effects” Clause. The Effects Clause provides that “the Congress may by general Laws prescribe the Manner in which [the public] Acts, Records and Proceedings [referred to in the first sentence] shall be proved, and the Effect thereof.” The relevance of the Effects Clause power to CCR legislation implicates a variety of issues, some of which have not been conclusively established and about which there remains significant scholarly disagreement. This sub-Part merely identifies those issues, without purporting to offer a definitive analysis of them.

1. *The Provision's Subjects*

At first blush, the first question—what are “public Acts, Records and Proceedings”?—is perhaps susceptible to a fairly clear answer. As Professor Ralph Whitten, a leading scholar of the full faith and credit provision, notes, the Full Faith and Credit Clause itself (and thus the subsequent Effects Clause) applies to “the public acts (or statutes), non-judicial records, and

94. “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other state. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.” U.S. CONST. art. IV, § 1.

95. See Letter from Stephen Sachs, Professor of Law Duke University School of Law, Randy Barnett, Director of Georgetown Center for the Constitution at Georgetown University Law Center, and William Baude, Assistant Professor of Law Chicago Law School to the Hons. Trey Gowdy, Richard Hudson, and Justin Amash (March 23, 2017), *reprinted at* http://www.stevesachs.com/HR38_SachsBarnettBaudeLtr_20170323.pdf (urging that Congress rely on this power for CCR legislation).

judicial proceedings (or judgments) of each state.”⁹⁶ But ambiguities immediately cloud this seemingly straightforward (and comprehensive) accounting of the items subject to the full faith and credit provision. Those definitional ambiguities (and others, as noted below) arose from the debate over same-sex marriage in the two decades between Hawaii’s first tentative steps toward same-sex marriage rights⁹⁷ and *Obergefell v. Hodges*’s⁹⁸ nationalization of that right. In particular, they arose in the context of the debate about what, if anything, the Full Faith and Credit Clause said about states’ obligations to honor out-of-state same-sex marriages⁹⁹ and about whether Congress could use the Effects Clause to authorize states to refuse to honor such marriages.¹⁰⁰

With regard to the class of state actions that are subject to the Full Faith and Credit Clause, Professor Whitten questioned the status of a marriage license as a “record” that was subject to the Clause. Instead, he suggested, a marriage license or any other state-granted license¹⁰¹ “is simply evidence of some right or privilege granted by the laws of a state.” Thus, according to Professor Whitten, if a person who (pre-*Obergefell*) entered into a same-sex marriage in State A sought State B’s recognition of the marriage license State A granted him, the full faith and credit argument for such recognition would rest on State B’s obligation to give full faith and credit to State A’s “public Acts.”¹⁰²

Of course, the significance, if any, of the difference between a state’s obligation to give full faith and credit to another state’s “Records” and its obligation to give full faith and credit to a state’s “public Acts” depends on the significance of its respective underlying obligations. This sub-Part now turns briefly to that question.

96. Ralph U. Whitten, *Full Faith and Credit for Dummies*, 38 CREIGHTON L. REV. 465, 466 (2005).

97. See *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993) (holding that Hawaii could ban same-sex couples from marrying only if that prohibition could satisfy strict scrutiny).

98. 135 S. Ct. 2584 (2015).

99. Compare, e.g., David Currie, *Full Faith and Credit to Marriages*, 1 GREEN BAG 2d 7 (1997) (concluding that the Full Faith and Credit Clause did not require states to honor out-of-state solemnized same-sex marriages) with Evan Wolfson & Michael Meicher, *A House Divided: An Argument Against the Defense of Marriage Act*, 58 OR. STATE BAR BULLETIN 17, 17–18 (1998) (suggesting that the Full Faith and Credit Clause might require states to honor such marriages).

100. See *infra* note 117 (citing scholarly analyses coming to differing conclusions on the Effects Clause question with regard to DOMA).

101. See Whitten, *supra* note 96, at 477. Indeed, Professor Whitten used a concealed carry license as his example.

102. See *id.* at 479 (“I hope that enough has been said to convince the reader that the issue of concern in interjurisdictional marriage enforcement cases is full faith and credit to state public acts . . .”).

2. *The Clause's Self-Executing Force*

Scholars disagree on the obligations that the Full Faith and Credit Clause imposes on states. As one recent review of the scholarship explained, “Until recently, most modern scholarship on the Full Faith and Credit Clause . . . accepted the premise, found in the Supreme Court’s precedent, that the first portion of the Clause provided a substantive command requiring states to give conclusive effect to state judgments and—in certain situations—to state acts.”¹⁰³ In particular, that traditional view has distinguished between a sister state’s judicial judgments and its laws (or “public Acts”),¹⁰⁴ with the former subject to a much stricter constitutional insistence on sister-state enforcement.¹⁰⁵

Thus, to the extent concealed carry licenses are best understood as public Acts, as Professor Whitten suggests,¹⁰⁶ the traditional view would suggest that any substantive requirement the Clause imposes is less stringent than the analogous requirement as applied to a judicial judgment. If one accepts all of (1) Professor Whitten’s definitional analysis, (2) the traditional view of the Clause’s substantive force but also (3) its relatively weaker impact on “public Acts” as opposed to judgments, then it is at least possible that an Effects Clause statute requiring enforcement of another state’s concealed carry permits might face stronger constitutional headwinds—or at least less of a presumption of constitutionality. This is a highly speculative argument, however.

Regardless, the traditional view has come under attack. As the review cited above went on to explain, “[a] growing number of scholars”¹⁰⁷ have come to question the idea that the Clause has a substantive impact. Instead, those scholars argue that the Clause’s self-executing force lay simply in its mandate that states admit such “public Acts, Records and judicial Proceedings” “as conclusive proof that such proceedings took place (*i.e.*, as conclusive proof that the court of another state rendered such a judgment or that the legislature of another state passed such an act).”¹⁰⁸ Thus, on this

103. Jeffrey M. Schmitt, *A Historical Reassessment of Full Faith and Credit*, 20 GEO. MASON L. REV. 485, 487 (2013).

104. See Whitten, *supra* note 96.

105. See, e.g., Andrew Koppelman, *Dumb and DOMA: Why the Defense of Marriage Act is Unconstitutional*, 83 IOWA L. REV. 1, 20 (1997).

106. See *supra* text accompanying note 102 (noting Professor Whitten’s suggestion to this effect in the analogous context of marriage licenses).

107. See *supra* text accompanying note 102 (noting Professor Whitten’s suggestion to this effect in the analogous context of marriage licenses).

108. *Id.*

theory, the self-executing force of the Clause simply amounts to an evidentiary rule.¹⁰⁹

As noted above, the outcome of this debate could conceivably bear on the extent of Congress's power under the Effects Clause. Because a full analysis of this debate is far beyond its scope, this Article brackets [it], and moves on to focus explicitly on the Effects Clause.

3. Congressional Power Under the Effects Clause

The question of Congress's power under the second sentence of the Clause is clouded by the fact that Congress has very rarely invoked it.¹¹⁰ As a result, courts have had few occasions to opine on and establish its scope.

The text of the Effects Clause suggests that Congress's power is broad indeed. It authorizes Congress both to "prescribe the Manner in which such Acts, Records and Proceedings shall be proved," and also to "prescribe . . . the Effect thereof."¹¹¹ With regard to the first of these powers, one might initially think that it provides ample authority for subsection (c)(1)'s provision that possession of a "facially valid" identification document and concealed carry permit constitutes "prima facie evidence" that the individual has the federally-required state-issued license.

Still, this argument is not free of ambiguity. The context for the Effects Clause was likely anticipated to be a state's judicial process, not an on-the-street law enforcement action where this provision of subsection (c)(1) would likely be most frequently employed.¹¹² Moreover, if the Full Faith and Credit Clause guarantees the conclusive authenticity of a sister state's records, one might argue that subsection (c)(1)'s provision for more tentative authentication is an odd fit with—and thus perhaps an inappropriate use of—the Effects Clause's grant of power to vindicate the earlier Clause's self-

109. See, e.g., Whitten, *supra* note 96, at 466 ("Translated into modern parlance, the first sentence of the clause commanded that the public acts (or statutes), non-judicial records, and judicial proceedings (or judgments) of each state had to be admitted into evidence as conclusive proof of their own existence and contents—i.e., as proof that such a statute, record, or judgment actually existed and dealt with the matters contained in the (properly authenticated) copy of the statute, record, or judgment presented to the court that was being asked to recognize it."); Stephen E. Sachs, *Full Faith and Credit in the Early Congress*, 95 VA. L. REV. 1201, 1206 (2009) "[T]he only self-executing portion of the Clause was evidentiary in nature: it obliged states to admit sister-state records into evidence but did not mandate the substantive effect those records should have.").

110. See, e.g., Wolfson & Meicher, *supra* note 99, at 18 (noting that prior to 1996 Congress had only invoked this power on four occasions, two of which involved legislation that simply prescribed methods for authenticating sister states' official records).

111. U.S. CONST. art. IV, § 1.

112. See *infra* text accompanying note 152 (noting the practical relevance of this question for the Effects Clause foundation for the *prima facie* evidence provision); see also Shearer, *supra* note 5, at 439–40 (noting the potential difficulties police officers might face when having to apply this provision).

executing authentication. At the very least, if Congress relied on the Effects Clause as support for this provision of subsection (c)(1), the novelty of this type of use of the Clause would require some careful thinking on these questions.

With regard to Congress's power to "prescribe . . . the Effect" of those state documents, Professor Michael McConnell has argued that that Clause's language provides Congress with a broad power allowing it to "prescribe that a particular class of acts will have no effect at all, or that their effect will be confined to their state of origin."¹¹³ Other scholars have resisted this argument, which is relevant both to Congress's power to enact an arguably weaker recognition rule than that required by the Full Faith and Credit Clause's self-executing requirement¹¹⁴ and to the scope of Congress's power more generally. Professor Laurence Tribe has analogized the Effects Clause to Congress's power to enforce the Fourteenth Amendment, concluding that Congress can expand a state's full faith and credit obligation beyond the constitutionally-required minimum, but cannot restrict it.¹¹⁵ Professor Andrew Koppelman embraced that same conclusion via a textual argument. He has argued that Congress's power under the Effects Clause should be interpreted in light of the Full Faith and Credit Clause's affirmative mandate to states to accord full faith and credit; thus, he concludes that Congress's power should not be read "in a way that contradicts [the prior Clause's] self-executing command."¹¹⁶

This discussion also played out against the backdrop of the same-sex marriage debate of the last two decades. In this case, the Effects Clause discussion concerned Congress's enactment of the Defense of Marriage Act (DOMA), one provision of which, grounded on its power under the Effects Clause, authorized states to refuse legal recognition to same-sex marriages legally performed in other states. Because DOMA cabined rather than extended the scope of states' full faith and credit obligations, the debate over

113. Koppelman, *supra* note 105, at 20 (quoting Professor McConnell's letter to Congress as it was considering the Defense of Marriage Act).

114. See text accompanying *supra* note 112 (providing one example of this issue).

115. See *id.* at 19 (quoting Professor Tribe's letter to Congress as it was considering the same legislation that motivated Professor McConnell's letter).

116. *Id.* at 21.

its constitutionality¹¹⁷ is not directly relevant to the analogous debate over CCR legislation's foundation in the Effects Clause.¹¹⁸

Nevertheless, the DOMA debate does reflect several considerations that are relevant to the CCR issue. Perhaps most foundational is the question whether the full faith and credit provision points unambiguously toward national uniformity. Some scholars attacking DOMA's constitutionality suggested that it does—on that ground, they argued that DOMA's authorization to states to refuse to recognize other states' same-sex marriages was unconstitutional.¹¹⁹ Other scholars disagreed, citing the guarantee's dual goals of uniformity and state autonomy—or, as one commentator put it, “a union of a certain kind: a union of meaningfully empowered sub-federal polities.”¹²⁰ Again, to the extent this debate played out against the backdrop of DOMA, which sought to authorize *disuniformity* on the relevant question (the legal status of same-sex marriages), the uniformity/state autonomy distinction sounds in a different register in the CCR debate, in which the federal law in question seeks to impose *uniformity* at least of a sort—that is, uniformity via nationwide reciprocity.¹²¹

This distinct character of CCR legislation raises another question, one that again appeared in the DOMA debate. That debate featured arguments that DOMA, by selecting particular types of state legal actions for unfavorable sister-state treatment, unconstitutionally singled-out certain types of state laws for unfavorable sister-state treatment. According to Professor Laurence Tribe, this feature of DOMA, if valid, would necessarily mean that “Congress can pick and choose any substantive field governed by state law . . . and render ‘any State’s official acts, on any subject, to second-class status’ that need not receive full faith and credit, undermining the ‘Tenth Amendment’s unambiguous language, that ours is a National Government whose powers are limited to those enumerated in the Constitution itself.’”¹²²

117. Compare, e.g., Koppelman, *supra* note 105 (arguing that DOMA was unconstitutional) with Mark D. Rosen, *Why the Defense of Marriage Act is Not Yet (?) Unconstitutional: Lawrence, Full Faith and Credit, and the Many Societal Actors that Determine What the Constitution Requires*, 90 MINN. L. REV. 915 (2006) (reaching a tentatively opposing conclusion).

118. But see text accompanying *supra* note 112 (providing one example where the DOMA model might conceivably be more directly relevant).

119. See, e.g., Koppelman, *supra* note 105 at 22; Rosen, *supra* note 117, at 934 (quoting Professor Tribe to this effect).

120. Rosen, *supra* note 117, at 937.

121. See text accompanying *supra* note 83 (noting the standardizing effect of CCR legislation).

122. Rosen, *supra* note 117, at 939 (quoting Professor Tribe's letter to Congress); see also Stanley E. Cox, *DOMA and Conflicts Law: Congressional Rules and Domestic Relations Conflicts Law*, 32 CREIGHTON L. REV. 1063, 1064 (1999) (arguing that DOMA violates state sovereignty “because it invalidates state judgments based on their content alone”).

Again, the unique effect of CCR legislation requires that we translate these arguments. The approximate idea would be that CCR legislation, by identifying a species of state actions (here, grants of concealed carry permits) for particularly *favorable*¹²³ full faith and credit treatment, amounts less to a general, nationwide choice-of-law rule and more to a substantive insistence that one state's laws on a given topic be given "first class status."¹²⁴ So understood, this translation reveals the fundamentally different nature of the arguments in these two cases. Professor Tribe's anti-DOMA argument appears to rest on a concern that DOMA would relegate a pro-marriage-equality state's laws to "second-class status" if, as DOMA authorized, a state could refuse to honor that state's same-sex marriages. The analogous concern with CCR legislation would have to be understood as the mirror image of this argument: essentially, a CCR law would allow a permissive concealed carry state's laws to trump a more restrictive state's laws, by allowing a permissive state's permit-holder to travel to the more restrictive state and flout that latter state's more stringent laws.¹²⁵

The highly imperfect nature of this translation (indeed, its character as the mirror image of the anti-DOMA argument) means that we would need to think hard about whether CCR legislation would impact state sovereign prerogatives to the same degree Professor Tribe alleged that DOMA did. Presumably, the analogous potential constitutional flaw CCR legislation would lie in the principle, reflected in the Tenth Amendment, that within its sphere of authority a state retains the prerogative to regulate its citizenry as it (and its citizenry) see fit. Of course, this principle would be subject to federal power to preempt such choices, if the constitutional authority for such preemption exists. Thus, just as one participant in the DOMA debate correctly observed in that context, the Tenth Amendment argument in the

123. The word "favorable" is italicized to distinguish the treatment the affected state law would receive under CCR legislation as compared with the unfavorable treatment the relevant state law would receive in Professor Tribe's argument against DOMA.

124. Cf. text accompanying *supra* note 122 (quoting a source attacking DOMA for singling out certain states' laws on certain topics for "second class status"); see also *supra*, note 123 (again flagging this distinction).

125. To be sure, it is possible to map DOMA more precisely onto CCR legislation. One could argue that a CCR law would cast a more gun-restrictive state's laws into the same "second class status" into which DOMA allegedly cast the laws of marriage-equality jurisdictions. But this argument seems weak: Under CCR legislation a gun-restrictive state's laws are not really being ignored or refused effect by sister states. At most, they would simply have little practical relevance, as gun carriers flocked to more permissive states to obtain their permits. This is not to say that therefore the more restrictive state is not suffering an injury to its sovereign interests. But the injury would have to be expressed differently, as set forth in the text paragraph following this footnote.

CCR context would collapse back on the question whether the Effects Clause authorized CCR legislation.¹²⁶

This last insight suggests that debates about the extent of Congress's power under the Effects Clause might degenerate into an unhelpful circularity. But the circle could be broken. First, the Effects Clause's explicit proviso that such federal legislation take the form of "general laws"¹²⁷ might be read as requiring that Effects Clause legislation be what one commenter on DOMA called "content neutral"¹²⁸—that is, less explicitly focused on one regulatory area. Another participant in the DOMA debate, one generally critical of this argument, nevertheless conceded that it rested on a "plausible textual basis."¹²⁹ If accepted, this argument would presumably cast serious doubt on the Effects Clause foundation for CCR legislation.¹³⁰

Second, such circularity could be broken by a judicial decision that embraces a substantive vision of federalism that is inconsistent with the effect of CCR legislation. This vision might simply insist that, whatever the Effects Clause authorizes, it does not allow Congress to override any state's legitimate police power regulation by insisting that that state apply another state's law *simpliciter*.¹³¹ This vision is not implausible. After all, the Court in *United States v. Lopez* never denied that possession of a gun in a school zone in fact affected interstate commerce; instead, it held that it could not conclude that such possession counted *legally* as interstate commerce subject

126. See Rosen, *supra* note 117, at 939 (describing arguments like this as "parasitic on the conclusion that the Effects Clause does not authorize Congress to enact DOMA.").

127. U.S. CONST. art. IV, § 1.

128. Cox, *supra* note 122, at 1081–82.

129. Rosen, *supra* note 117, at 941. However, another commenter has observed that Congress has in fact legislated under the Effects Clause to require that states honor a particular class of judicial judgments. See Julie L.B. Johnson, *The Meaning of 'General Laws': The Extent of Congress's Power Under the Full Faith and Credit Clause and the Constitutionality of the Defense of Marriage Act*, 145 U. PA. L. REV. 1611, 1642–43 (1997) (discussing federal legislation under the Effects Clause mandating sister-state recognition of judgments related to child support, child custody, and protection orders); *id.* at 1622 n.56 (citing such laws).

130. For a discussion of the Clause's requirement that congressional action be taken via "general Laws," see Johnson, *supra* note 129.

131. Cf. Whitten, *supra* note 96 (arguing that full faith and credit for items such as marriage and concealed carry licenses should be understood in the context of full faith and credit for the laws of the state that issue such a license). For a discussion of the question whether the Constitution speaks to choice-of-law issues of the sort implicit in CCR reciprocity legislation, see Douglas Laycock, *Equal Citizens of Equal and Territorial States: The Constitutional Foundations of Choice-of-Law*, 92 COLUM. L. REV. 249 (1992); *id.* at 251 (offering as one of three constitutional principles governing choice of law that "the fundamental allocation of authority among states is territorial," and arguing that "all choice-of-law rules must be consistent with, and derived from, the fundamentally territorial allocation of authority among the states. . . . [A] state's claim to regulate behavior or to govern a dispute must be based on some thing or event within its territory.").

to federal regulation, given the effect such a holding would have in eviscerating any realm of regulation reserved to the states.¹³² Similarly, a court might suggest that the Effects Clause simply cannot be read as authorizing Congress to single out a particular state's law on a particular subject and cram it down the throats of sister states—especially when that federal mandate would have a clear substantive effect.¹³³

These arguments are speculative and subject to a great deal of debate. Again, given the paucity of caselaw on the scope of Congress's power under the Effects Clause, they remain open questions that require careful study.

III. Constitutional Defenses

In addition to the issues Part II has sketched out, CCR legislation raises difficult questions about what this Article calls “constitutional defenses.” Such “defenses” do not address the preliminary question of whether a constitutional source of authority exists for a CCR statute. Rather, they assume such a source exists and consider instead whether such legislation would still be unconstitutional, because it would transgress an affirmative limit on Congress's authority. This part of the Article addresses two such limits: the anti-commandeering principle, and the non-delegation doctrine.

A. The Anti-Commandeering Defense

Even if a federal law reflects an otherwise-constitutional use of Congress's Article I powers, the possibility always remains that it violates the federalism implications of the Tenth Amendment.¹³⁴ In the case of CCR legislation, the most notable of such limits is the anti-commandeering concept adopted by the Court in *New York v. United States*.¹³⁵ As readers

132. See *United States v. Lopez*, 514 U.S. 549, 563–64 (1995); see also *Jones v. United States*, 529 U.S. 848, 858 (noting this concern in *Lopez*).

133. See Johnson, *supra* note 129 (suggesting how such congressional actions might violate the Effects Clause's “general Laws” proviso); Koppelman, *supra* note 105 (noting how the traditional view of the Full Faith and Credit Clause imposed a stricter sister-state obligation with regard to judicial judgments and a less stringent obligation with regard to “public Acts”); see also *supra* note 102 (quoting a leading full faith and credit scholar's conclusion that state-granted licenses should be understood as “public Acts” for full faith and credit purposes).

134. See, e.g., *New York v. United States*, 505 U.S. 144, 156 (1992) (“Congress exercises its conferred powers subject to the limitations contained in the Constitution. Thus, for example, under the Commerce Clause Congress may regulate publishers engaged in interstate commerce, but Congress is constrained in the exercise of that power by the First Amendment. The Tenth Amendment likewise restrains the power of Congress . . .”). Whether this same limitation applies to the other possible sources of authority for a CCR statute presents an interesting question. See text accompanying *infra* note 175 (discussing this question in the context of the Enforcement Clause); *infra* note 152 (discussing this question in the context of the Effects Clause).

135. 505 U.S. 144 (1992).

will likely know, the Court has held that even laws otherwise within Congress's Commerce Clause power to enact are unconstitutional if they direct, or "commandeer," the actions of states in their capacities as sovereign legislators or law enforcers.

Thus, in *New York*, the Court struck down a provision of a federal law regulating the disposal of low-level radioactive waste that offered the states a choice of either taking title to any such waste produced within its borders or legislating a solution to the disposal problem pursuant to federally-mandated standards. The Court described the first of these options as "no different than a congressionally compelled subsidy from state governments to radioactive waste producers."¹³⁶ More relevantly, the Court described the second option—that states craft a legislative solution based on federal standards—as "commandeering" state governments by forcing their legislatures to prioritize one policy issue for resolution over others.¹³⁷

Five years after *New York*, in *Printz v. United States*,¹³⁸ the Court extended the anti-commandeering principle to apply to state law enforcement.¹³⁹ In *Printz*, the Court struck down a provision of a federal gun control law that required local law enforcement officials to conduct background checks of prospective firearms purchasers in certain instances. Applying similar reasoning as in *New York*, the Court extended the anti-commandeering concept to state law enforcement. At the same time, the Court, presumably anticipating the logical next question after its ruling, explicitly endorsed federal "commandeering" of state judiciaries as constitutionally unobjectionable.¹⁴⁰

1. The Basic Argument

The anti-commandeering argument against CCR legislation is seemingly straightforward.¹⁴¹ The argument is that a local police officer finding a concealed weapon on an individual would be required to enforce the federal reciprocity rule, and thus honor an out-of-state concealed carry permit, but only if the officer determined that the out-of-state permit was in fact valid and that the individual possessed the requisite ID specified in the

136. *N.Y.*, 505 U.S. at 175.

137. *See id.* at 175–76.

138. 521 U.S. 898 (1997).

139. *Id.*

140. *See id.* at 928–29 (1997) (distinguishing federal commandeering of state judiciaries on the authority of *Testa v. Katt*, 330 U.S. 386 (1947)).

141. Other commenters have identified different anti-commandeering problems with CCR legislation. *See* Shearer, *supra* note 5.

statute.¹⁴² Indeed, subsection (c) of the bill explicitly limits the ability of local police to arrest or detain persons for illegal gun possession, even to the point of prescribing the probative effect of a person's presentation of the permit and identification on the question whether that person falls within the class of persons permitted to possess a concealed weapon.¹⁴³ Thus, one might intuitively understand the CCR bill as a federal direction to local law enforcement about how they should do their jobs, even to the point of prescribing federal standards governing their decisions whether or not to arrest or detain someone.

Nevertheless, this initial argument quickly encounters complexities.

2. *The Analogy to the Brady Act*

One entry point into these complexities is the question whether the burden on state law enforcement CCR legislation imposes can be analogized to the burden the Brady Act unconstitutionally imposed on local jurisdictions' "chief law enforcement officers" ("CLEOs"), who were required to conduct the background checks the federal law mandated. In *Printz*, the Court concluded that that federal mandate issued to CLEOs compelled them to "administer a federal program,"¹⁴⁴ and thus violated the anti-commandeering principle. Would the CCR bill do the same?

One preliminary defense of the CCR bill can be rejected at the outset: In *Printz*, the Court rejected the argument that the onerousness of the federal obligation was relevant to the commandeering question.¹⁴⁵ Thus, an argument focusing on the relative ease of complying with the federal mandate would be unavailing against a commandeering challenge. But other defenses require more thought. One might defend the CCR bill from an anti-commandeering challenge on the ground that the bill would impose no freestanding obligation on the part of local law enforcement to do anything.

142. See H.R. 38 §101 (a)

143. Curiously, Section 102 of the bill, titled "Rule of Construction," appears to limit this restriction on police conduct by allowing short investigatory stops. See H.R. 38 § 102 ("Nothing in this title prohibits a law enforcement officer with reasonable suspicion of a violation of any law from conducting a brief investigative stop in accordance with the Constitution of the United States."). This provision is clearly designed to allow police officers to make the investigative stops the Supreme Court upheld against a Fourth Amendment challenge in *Terry v. Ohio*, 392 U.S. 1 (1968). Thus, if subsection (c)(1)'s protection against "detention" means anything, it presumably means a protection against something more substantial than what has become known as a "Terry stop," but something less substantial than an arrest, which subsection (c)(1) mentions independently. See text accompanying *infra* notes 154-156 (considering this issue further).

144. *Printz*, 521 U.S. at 933.

145. See, e.g., *United States v. California*, 314 F.Supp.2d 1077, 1089 (E.D. Ca. 2018) ("Even requiring state officers to perform discrete, ministerial tasks violates the [anticommandeering] doctrine.") (citing *Printz*, 521 U.S. at 929-30).

This defense would seek to distinguish the law struck down in *Printz*, which required the CLEO to respond to an individual's attempted purchase of a weapon by making reasonable efforts to determine whether the purchase was legal.¹⁴⁶ By contrast, one might argue, a local officer's obligation to comply with the federal standards in the CCR bill would arise only upon the officer's independent decision to investigate a case of possible illegal gun possession.

But this defense of the CCR bill hardly seems adequate. If a local police officer in a concealed carry state encounters an individual concealing a weapon, one would expect the officer in many or most cases to investigate whether that concealed possession was lawful. In turn, upon being presented with the individual's out-of-state permit and then applying the standards set forth in the federal law, the officer would presumably be "administer[ing] a federal program,"¹⁴⁷ one that has its own requirements and standards, which might be quite different from those of the host state. Indeed, even assuming that the onerousness of the federal mandate was relevant to the commandeering question,¹⁴⁸ one might easily conclude that "administer[ing] [that] federal program"¹⁴⁹ would be quite complex, given the officer's need to determine even the "facial"¹⁵⁰ validity of the out-of-state permit.¹⁵¹

Onerousness aside, state law enforcement discretion would be significantly limited by subsection (c)(1)'s provision that possession of "facially valid" documents specified in subsection (a) constitutes "prima facie evidence" that the individual possesses the federally-required state-issued license. Presumably, states retain the authority, subject to constitutional limits, to determine what constitutes adequate evidence of a particular asserted fact, such as the possession of a valid state concealed-carry license. Subsection (c)(1)'s determination of the probative value of a particular piece of paper, and its direction to local police to give that paper a particular evidentiary weight, imposes a federal rule of conduct the state officer is required to apply. It is not hard to imagine its effect on local law enforcement. For example, consider a scenario in which discovery of several forged concealed carry permits in the area leads local police to be extra careful about the validity of permits proffered by persons found to be

146. See *Printz*, 521 U.S. at 903.

147. *Id.* at 933.

148. But see *supra* text accompanying note 145.

149. *Printz*, 521 U.S. at 933.

150. See H.R. 38, 115th Cong. § 101 (c)(1) (2017).

151. See *Shearer*, *supra* note 5, at 439 (noting the difficulty of performing this task).

carrying a weapon. Subsection (c)(1)'s *prima facie* provision would directly impede a police decision to scrutinize such permits with extra care.¹⁵²

Perhaps even more significantly, subsection (c)(1)'s limitation on state law enforcement officers' ability to "arrest[]" or "detain[]"¹⁵³ an individual for any firearms possession-related offense without probable cause to believe that the federal law's provisions are being violated constitutes a direct federal command to state law enforcement. One might initially think that this command precludes the sort of pre-probable cause/pre-arrest questioning and pat-downs the Constitution allows law enforcement to perform,¹⁵⁴ and that presumably are an accepted practice in many police departments; however, Section 102 of the bill appears to expressly disclaim any intent to restrict such investigative stops.¹⁵⁵

This raises the question of what precisely this part of subsection (c)(1) accomplishes, given that, at one extreme, Section 102 allows investigative "*Terry* stops"¹⁵⁶ and that, at the other, probable cause is required for an arrest. Assuming that Section 102 accomplishes something, it presumably prevents "detentions" longer than short *Terry* stops that are supported by less than probable cause. Perhaps such detentions would take the form of longer detentions while the police officer confirmed the validity of the permit. (Indeed, this explanation would explain why this provision and the *prima facie* evidence provision appear in the same subsection.) But regardless, assuming that the detention protection provision means something, it necessarily commands law enforcement to follow federal procedures when investigating crime and making detention decisions. As such, this provision intrudes, potentially deeply, into local police procedures, commanding local

152. Of course, this provision could be constitutionally grounded in the Effects Clause, discussed in Part II (C), *supra*. But see text accompanying *supra* note 104 (querying whether the Effects Clause appropriately applies to on-the-ground police practices). A grounding of this provision in the Effects Clause would in turn raise the question whether the anti-commandeering limitation would apply to legislation grounded in that Clause. This is an interesting question: since the anti-commandeering limitation does not apply to state judiciaries. See *Printz*, 521 U.S. at 298–29, most such legislation would not implicate this issue, since presumably most such legislation would be aimed at state courts. But that might make it more likely that the anti-commandeering limitation could be applied to such legislation, for example, when it impacted on-the-ground police procedure rather than state judicial procedure, since imposing such a limitation would not constitute a severe limitation on congressional power under that clause more generally. There is no conceptual reason that Effects Clause legislation would automatically be immune from federalism-based limits. See, e.g., Letter from Stephen Sachs, et al., *supra* note 95 (describing as "at best unclear" whether the Effects Clause, unlike the Commerce Clause, "confers any power to abrogate [state] sovereign immunity.").

153. See H.R. 38, 115th Cong. § 101 (c)(1) (2017).

154. See generally *Terry v. Ohio*, 392 U.S. 1 (1968).

155. See *supra* text accompanying note 143.

156. See *id.*

law enforcement to police according to federal-mandated standards as part of their administration of the federal reciprocity program.

3. *A Choice of Law Rule?*

But these conclusions are not free of ambiguity. As noted by the earlier sketched-out objection to the commandeering argument, it remains the case that the officer's obligation to administer the federal reciprocity program arises only upon the voluntary decision of the officer to apply the state's own concealed carry restrictions and investigate the legality of the concealed possession. This reality implies an understanding of the federal bill as simply a choice of law provision, with the officer required to apply the federal rule (and thus honor the out-of-state permit) only upon his voluntary decision to investigate the gun possession.

Thus, one could distinguish the officer's duties under the CCR bill from a CLEO's obligations under the Brady Act, on the theory that the latter law both explicitly imposed an obligation on the CLEO (to conduct the background check) and further that the burden it imposed might have been qualitatively different from any burden he otherwise had under state law. In other words, while a local police officer encountering a concealed weapon would presumably proceed to apply his own state's concealed carry law on his own, non-commandeered, initiative, altering his conduct only if the individual in question produced not a local permit but an out-of-state one, under the Brady Act a CLEO might be required to do something (perform a background check) that he otherwise would not have done under his own state's law. Indeed, this distinction finds indirect support in the fact that the CLEO-conducted background checks the Brady Act mandated applied when the state did not otherwise have an instant background check and when the weapons purchaser did not already possess a state-issued permit issued after a background check.¹⁵⁷ In sum, potentially unlike the CCR bill, the Brady Act did seem to impose a new *type* of obligation on the CLEO.

But again this analysis is clouded once one considers other examples. Consider a local jurisdiction's policy decision that police officers not inquire into a victim's or witness's immigration status when voluntarily initiating a conversation with that victim or witness. Would a federal mandate prohibiting such local rules—or, indeed, mandating that local law enforcement in fact make such inquiries—simply furnish a choice-of-law rule requiring adherence to the federal standard, once the police officer had already exercised her discretion to engage with the victim or witness? Or

157. See *Printz*, 521 U.S. at 902–03.

would it conscript the local officer as an enforcer of federal law, as prohibited by *Printz*?

4. *Murphy v. NCAA*

The Court's most recent commandeering case may provide an answer to this puzzle. In *Murphy v. National Collegiate Athletic Association* ("NCAA")¹⁵⁸ the Court struck down the federal Professional and Amateur Sports Protection Act ("PASPA") on the theory that it commandeered state legislative choices. As relevant for our purposes, PASPA prevented any state beyond those that already allowed professional sports betting from legalizing it.¹⁵⁹

The Supreme Court held that PASPA did indeed commandeer states. Speaking through Justice Alito, the Court distinguished PASPA from federal laws that accomplished uncontroversial federal preemption of state law. Justice Alito explained that such preemptive laws operated on individuals, giving them a right to engage in particular conduct regardless of any conflicting state law.¹⁶⁰ He stated that this analysis applied even to preemptive laws that spoke directly to states, for example, by forbidding them from enforcing any requirements that conflicted with the federal rule. Such provisions, Justice Alito noted, simply "confer on private entities . . . a federal right to engage in certain conduct subject only to certain (federal) constraints."¹⁶¹ By contrast, he observed that PASPA's prohibition on state action legalizing sports betting did not regulate private parties at all. As he explained, a private party that engaged in sports betting would not be violating federal law; rather, PASPA advanced the federal policy disfavoring such betting solely by prohibiting states from allowing it. Such a prohibition, he concluded, amounted to unconstitutional commandeering.

At one level, *Murphy*'s distinction between commandeering and preemption suggests that the federal reciprocal concealed carry bill does not run afoul of the commandeering prohibition. After all, subsection (a) is phrased explicitly as a grant to private persons of a federal right to concealed carry, if a person satisfies that subsection's criteria. Nevertheless, this answer still fails to address questions about subsection (c)'s direction to local law enforcement, both to refrain from arresting or detaining persons unless

158. *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1462 (2018).

159. The law carved out New Jersey, which was given one year from the law's enactment to decide whether to allow sports betting in Atlantic City. The state initially declined to do so, but after the one year period passed it changed its mind and authorized it, prompting the NCAA to sue, alleging a violation of PASPA.

160. See *Murphy*, 138 S. Ct. at 1479–81.

161. *Id.* at 1480.

probable cause exists to believe that the person is violating the federal rule of conduct and also to give certain documentation particular evidentiary effect.

Unlike PASPA, which was clearly a regulation of the state, the CCR bill is ambiguous on that crucial point. Subsection (a) might be understood as a grant of a federal license (via the other state's concealed carry license), while subsection (c) might be understood as a mandate requiring state law enforcement to conduct its business in a particular way. Indeed, the best reading of subsection (c) is that its direction to state police to refrain both from arresting or even detaining individuals with facially valid out-of-state carry licenses regulates how local law enforcement use their law enforcement discretion, by restricting them from taking law enforcement steps the Constitution permits them to take.¹⁶² Similarly, subsection (c)'s provision of a federal rule of evidence for local law enforcement to apply appears to regulate how a state determines the probative weight of particular pieces of evidence.

Taken together, it is hard to see subsection (c) as anything other than an instruction to local police to follow the federal law enforcement rule, rather than a regulation of a private party that merely preempts inconsistent state regulation.¹⁶³ If one takes seriously *Murphy*'s distinction between laws that regulate governments and laws that regulate individuals, this provision of subsection (c) should be understood as a federal directive to state law enforcement, and thus invalid under the anti-commandeering principle.

Consider perhaps the strongest contrary argument. This argument would describe the CCR bill as granting a nationwide federal concealed carry license to persons who have a valid state license. This description would bring it within *Murphy*'s description of a purely preemptive federal regulation of individual parties.¹⁶⁴ Indeed, one could analogize the holder of the federally-endorsed state-issued concealed carry permit with Thomas Gibbons from *Gibbons v. Ogden*,¹⁶⁵ who held a federal coasting license that the Supremacy Clause required New York authorities to recognize as superseding Aaron Ogden's conflicting state-granted monopoly. On this argument, subsection (c)'s provisions might be justified as providing merely the procedural details governing how that individual right is to be vindicated.

162. See generally *Terry v. Ohio*, 392 U.S. 1 (1968).

163. In particular, it makes no sense to think of an evidentiary rule in this context as regulating private parties, since the only function of such a rule would be to direct a police decision about the existence of evidence rendering the gun possession legal.

164. See *Murphy*, 138 S. Ct. at 1480 (offering as an example of a preemptive federal law rather than an illegitimately-commandeering one a federal statute that "confers on private entities . . . a federal right to engage in certain conduct subject only to certain (federal) constraints.").

165. 22 U.S. 1 (1824).

In particular, one could argue that the detention provision ensures that the holder of the out-of-state permit enjoys a degree of substantive liberty when exercising his federally-granted right, subject only to subsection (c)'s evidentiary rule.

But this final step seems one too far. The best way to read subsection (c) is as a regulation of how state officials should go about using their law enforcement discretion. First, subsection (c) is—indeed, can only be read as—a direct regulation of states. It is not phrased as a grant of a license to private parties,¹⁶⁶ and, as a prescription of particular police procedures, it cannot be so read if *Murphy*'s distinction between regulation of states and regulation of individuals is to be accorded any force.¹⁶⁷

Second, subsection (c) clearly directs how state officials—here, state law enforcement—perform their duties, and vetoes certain decisions, such as to detain a person while investigating his concealed carry permit. To quote *Murphy*, under PASPA “[i]t is as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals.”¹⁶⁸ Substitute “at the scene of a local police investigation” for “in state legislative chambers,” “police” for “legislators,” and “using their state-authorized law enforcement discretion” for “voting on any offending proposals,” and we have described the situation required by CCR. None of these substitutions is constitutionally relevant: *Printz* extends the anti-commandeering doctrine to law enforcement, and it does not matter that CCR *prohibits* certain police activity (namely, detaining a person asserting a concealed carry right based on an out-of-state permit) rather than compelling it. Rejecting a similar argument, the *Murphy* Court

166. Cf. *Murphy*, 138 S. Ct. at 1479 (“since the Constitution confers upon Congress the power to regulate individuals, not States, [a federal law alleged to be merely preemptive rather than commandeering] must be best read as one that regulates private actors” in order to be constitutional) (internal quotation and citation omitted).

167. To be sure, this distinction does not turn on the wording of a given provision. As the Court explained in *Murphy*, a law could be worded as a prohibition on a state regulating a private party but still be best understood as a grant of a federal license to engage in particular action. See *Murphy*, 138 S. Ct. at 1480 (using as an example of this phenomenon a federal law deregulating airlines and prohibiting any state from imposing its own regulations on the federally-deregulated conduct). But subsection (c) differs from this template: unlike the airline example *Murphy* provided, it does not regulate states in the service of vindicating federal regulation (or deregulation) of private persons' primary conduct. Instead, it regulates the means by which state law enforcement investigate whether in fact the individual in question is exercising the federally-granted right. Indeed, that regulation extends far beyond federal insistence that that right exist, to intrude into the realm of police investigative procedures—most notably, police decisions whether or not to detain a person while determining whether that person is indeed validly exercising that federal right.

168. *Murphy*, 138 S. Ct. at 1478.

observed that the distinction between prohibiting and compelling state action “is empty.”¹⁶⁹

Thus, whatever one might say about subsection (a)’s grant of a federal right to carry a concealed weapon in any concealed-carry state by producing any state’s concealed carry permit, subsection (c)’s directions to local police as to how to investigate and enforce this provision violates the anti-commandeering doctrine. To be sure, the CCR situation is not on all fours with the situation in *Printz*. In *Printz* it was both theoretically possible and practically workable for federal officials to be tasked with performing the background checks the Brady Act required.¹⁷⁰ By contrast, the typical law enforcement situation CCR presents involves a local police officer encountering a person concealing a weapon. Given that situation, it is implausible that the local officer could immediately summon a federal official who would then take charge of the concealed carry investigation.¹⁷¹

One might think that this reality requires the conclusion that subsection (c) does *not* commandeer state law enforcement. This argument insists that it would be constitutionally unacceptable for the federal government to find itself unable fully to vindicate the concealed carry right that we are presuming it has the constitutional authority to confer.¹⁷² Thus, one might conclude, the federal government’s presumed power to confer that right must mean that subsection (c)’s measures for vindicating it simply cannot violate the anti-commandeering principle.

But that conclusion would be incorrect. First, as noted earlier,¹⁷³ even laws that unquestionably constitute federal regulation of interstate commerce are subject to the anti-commandeering limitation. None of the anti-commandeering cases suggests that the prohibition on commandeering must give way when that prohibition prevents a federal right from being fully vindicated. Second, and more generally, it is simply wrong to say that Congress must have the power to fully vindicate any right that it has the power to confer. Indeed, the very federalism concerns that animate the commandeering prohibition create exactly such results in other doctrinal areas. For example, Eleventh Amendment immunity often prevents a federal

169. *Murphy*, 138 S. Ct. at 1478.

170. *See Printz v. United States*, 521 U.S. 898, 939, 959 (1997) (Stevens, J., dissenting) (pointing out that the result of the Court’s holding was that the federal government would be incentivized to send federal law enforcement officials into the states to perform the required background checks).

171. Indeed, such a dynamic would presumably entail the detention of the individual until the federal officer arrived, contradicting subsection (c).

172. *But see supra* Part II (raising questions about that authority).

173. *See supra* text accompanying note 134.

right-holder from suing a state that is violating that right, and thus prevents her from vindicating it.¹⁷⁴

This argument also ignores the crucial question of the constitutional power Congress would be relying on when enacting CCR legislation. As explained immediately above, relying on the commerce power to create the reciprocal concealed carry right carries with it the anti-commandeering limitation on that power, even if that limitation means that the right cannot be fully vindicated. But other congressional powers may not be subject to the anti-commandeering limitation. Most notably, there is a real question whether laws based on Congress's Fourteenth Amendment enforcement power are subject to the anti-commandeering restriction. After all, as the Court has noted in a different context,¹⁷⁵ the Fourteenth Amendment is a direct restriction on state power, and differs from the Commerce Clause on that basis. The distinctive character of Section 1 of the Fourteenth Amendment as a set of explicit "thou shalt nots" directed to states makes it at least plausible, if not outright logical, that the anti-commandeering prohibition does not apply to congressional attempts to enforce those restrictions on state conduct.

Thus, there might be a way for Congress to accomplish the apparent commandeering that subsection (c) seeks to accomplish. But that would require Congress to ground a CCR statute in its power to enforce either the Second Amendment, the Fourth Amendment (as applied to the bill's limits on police's power to detain persons suspected of a concealed weapons violation), or perhaps the Due Process Clause more generally (as applied to the bill's insistence that a particular quantum of evidence is sufficient to make out a *prima facie* showing of lawful concealed carry).¹⁷⁶ While this Article has bracketed a full discussion of congressional power to enact CCR

174. See, e.g., *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996) (concluding that the Interstate Commerce Clause does not allow Congress to abrogate state sovereign immunity to claims seeking retrospective relief such as damages for violations of a congressionally-granted right enacted on the authority of that clause). Of course, such a plaintiff could attempt to get around the Eleventh Amendment's immunity grant, but such attempts are by no means automatically or nearly-automatically successful—and, importantly, such attempts do not gain force merely because they reflect fallback attempts to vindicate a federal right once a first remedy is deemed unavailable. See *id.* (rejecting the plaintiff's argument that its lawsuit against the state was allowable under *Ex parte Young*, 209 U.S. 123 (1908), after holding that its statutory claim was unavailable).

175. See *Seminole Tribe of Florida*, 517 U.S. at 65–66 (1996).

176. The evidentiary provision could also be supportable under the power Article IV's full faith and credit guarantee gives to Congress. But see *supra* Part II (C) (analyzing that power generally and in particular as applied to the evidentiary provision); see also *supra* note 152 (considering whether an Effects Clause grounded statute might also be subject to the anti-commandeering limitation).

legislation under its enforcement power,¹⁷⁷ very serious questions cloud any such claim, either with regard to the CCR right generally or subsection (c) of the bill in particular.¹⁷⁸ While that question requires fuller study and analysis, it should be understood that, with one possible exception,¹⁷⁹ only the enforcement power could even potentially justify subsection (c).

5. Policy Arguments

Beyond doctrinal details, the broader policies underlying the anti-commandeering rule also suggest the problematic nature of the CCR bill. Most notably, the anti-commandeering doctrine serves, among other purposes, to ensure that the public remains able to assign blame (or praise) for particular regulatory initiatives to the proper level of government.¹⁸⁰ Thus, for example, by mandating that states develop a policy addressing the safe disposal of low-level radioactive waste, the federal statute struck down in *New York* blurred the lines of governmental accountability by imposing on state governments a federal mandate to prioritize that policy issue over others. Similarly, the Brady Act's background check provision required local law enforcement officers to spend time satisfying that federal mandate, thus blurring accountability when the CLEO necessarily deprioritized other law enforcement needs.

One can easily envision a scenario in which a local police officer's decision not to arrest or even detain someone found to be concealing a weapon would raise the public's concern about how that officer was using her discretion. That type of situation seems exactly the one the Court worried about in *New York* and *Printz*, with the public objecting to how local officers were using their discretion and the officers in turn pointing to the federal mandate and attempting to explain that they had no choice. For example,

177. *But see supra* Part II (B).

178. *See supra* note 73 (citing scholars remarking on the strictness of the Court's scrutiny of federal legislation grounded on the Enforcement Clause).

179. Article IV authorizes congressional action to "prescribe the Manner" by which the actions subject to the Full Faith and Credit Clause "shall be proved," "and the Effect thereof." U.S. CONST. art. IV § 1. At most, this power might allow Congress to prescribe a rule regarding how the existence of an out-of-state concealed carry license may be proven. This power might thus allow Congress to prescribe subsection (c)'s prima facie evidence provision. However, such an argument assumes what is by no means proven—that a concealed carry permit is in fact subject to the full faith and credit guarantee, and that Congress's Article IV power extends into the context of on-the-ground state law enforcement conduct. *See supra* Part II (C) (discussing this question briefly). This power would presumably not authorize subsection (c)'s rule governing police officers' discretion to detain persons who produce an out-of-state permit supporting their concealed carry. And again, any such Effects Clause argument would encounter the possibility that laws enacted pursuant to that authority are subject to the anti-commandeering limitation. *See supra* note 152.

180. *E.g.*, *Printz v. United States*, 521 U.S. 898, 930 (1997) (explaining the anti-commandeering idea in these terms).

imagine a federal mandate that, upon discovery of an immigrant's unlawful residency status, local officers had to detain the immigrant. One can easily imagine local citizens objecting to that use of the officer's discretion, and finding themselves frustrated when the officer explained that she was simply complying with a federal mandate.

The hard question here is whether the CCR bill's provision of rules governing arrest and detention of individuals possessing concealed weapons, and its provision of a rule of evidence for determining the legality of any instance of concealed possession, are best understood as elements of the concealed possession right the federal government presumably¹⁸¹ has the authority to confer, or a regulation of how state law enforcement exercises its discretion. This Article has already discussed this issue in the context of discussing the details of anti-commandeering doctrine.¹⁸² But, appropriately enough, the same issue arises when one considers that doctrine's underlying justification. In considering this final question, it may simply be that *both* legislation that unconstitutionally commandeers and legislation that simply preempts state law to grant a federal right implicate accountability concerns. For example, one can envision angry New Yorkers asking their port commissioner why Aaron Ogden's monopoly is not being enforced, or angry New Yorkers asking an NYPD officer why their concealed carry law is not being enforced, and feeling unsatisfied when the commissioner or the officer points to Thomas Gibbons' or the out-of-state gun carrier's federal (or federally-endorsed) license and explaining that he had no choice but to honor it.

This uncomfortable reality—that accountability is blurred regardless of how we conceptualize the federal law in question—perhaps means, ironically, that a more formalist conception of the commandeering concept is the best approach. If so, then at least subsection (c)'s provisions appear vulnerable to the anti-commandeering claim.

B. The Non-Delegation Defense

A final argument for questioning the constitutionality of the federal reciprocal concealed carry bill is both the least plausible-sounding but potentially the most meritorious. It may be that such a law would (or should) be struck down as violating the non-delegation doctrine.

The most obvious objection to this suggestion is the well-known characterization of the non-delegation doctrine as a moribund relic of the pre-1937 Court. But that characterization oversimplifies a more nuanced

181. See *supra* Part II (considering Congress's authority to enact CCR legislation).

182. See text accompanying *supra* notes 164-171.

reality.¹⁸³ Beyond the equally well-known fact that the Court has never formally repudiated the doctrine, in recent decades the Court has employed the threat of a non-delegation strike-down as justification for giving narrowing interpretations to otherwise broad-sounding statutes.¹⁸⁴ More recently, the Court's *cert. grant* on the non-delegation issue in *United States v. Gundy*¹⁸⁵ makes it clear that interest exists at the Court in examining at least the potential for a renewed focus on the non-delegation principle. Unless the Court completely dismisses the non-delegation argument in *Gundy* as frivolous, any decision it renders—even one upholding the statute—will presumably warrant lower courts giving this argument more than cursory attention when litigants raise it.

The CCR bill, if it ever became law, would likely be a good candidate for any such revitalized non-delegation scrutiny. Two features of such a law work together to make this the case. First, such a law would delegate power to states, rather than to an instrumentality of the federal government (such as an executive branch or independent administrative agency). Second, that delegation would lack even the hint of a standard. This sub-Part considers these issues in that order.

1. *Delegation to a State*

The first unusual feature of the CCR bill is that it would delegate power to a state, by prescribing that state-determined standards all-but fully govern¹⁸⁶ when a person could obtain a concealed carry permit that then, by operation of that statute, would be valid in any state that allows any form of concealed carry.

a. Federal Incorporation of State Law

To be sure, the mere incorporation of state law into federal law—and thus, the implied delegation to state lawmakers—has long been held to not raise a serious non-delegation problem. A well-known example of such

183. See, e.g., Cass Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315 (2000) (“Reports of the death of the nondelegation doctrine have been greatly exaggerated.”).

184. See, e.g., *Indust. Union Dep’t AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607 (1980) (plurality opinion) (adopting limited interpretation of a federal workplace safety law in order to avoid serious non-delegation problem); *Whitman v. American Trucking Ass’n*, 531 U.S. 457 (2001) (doing the same to a federal environmental law); cf. *National Cable TV Ass’n v. United States*, 415 U.S. 336 (1974) (construing a congressional authorization to an agency to collect a fee as not authorizing it to levy a tax, given the non-delegation problems that would arise in that latter case). See also Sunstein, *supra* note 183.

185. *United States v. Gundy*, 695 Fed. Appx. 639 (2017).

186. To be sure, the bill limits the reciprocal effect of state-issued concealed carry permits to persons “not prohibited by federal law from . . . possessing a firearm.” H.R. 38, 115th Cong. § 101(a) (2017).

incorporation is the series of assimilative crimes laws Congress has enacted since the early 19th century. These federal laws make applicable in federal enclaves such as military bases and national parks the criminal laws of the state in which the given enclave is located. In 1910, the Court in *easily* and quickly rejected a non-delegation attack on such laws.¹⁸⁷ However, until the mid-20th century such laws were static, in the sense that they adopted as federal law whatever state law was at that point extant. Thus, these versions of the assimilative crimes laws simply accomplished incorporation by reference, as if Congress had merely copied verbatim the criminal codes of the states as they existed at that moment and made them federal law in the relevant enclaves.

As one can imagine, crafting these assimilative crimes laws in this static way was not ideal, as the federal law of an enclave would slowly become inconsistent with that of the surrounding state as that state gradually altered its laws. Thus, in 1948, Congress enacted a dynamic assimilative crimes law, one that made the law of the surrounding state applicable in the relevant enclave, but also continued to update that federal law as the law of the surrounding state changed. A concealed carry reciprocity law would be more analogous to this latter version of the assimilative crime statute, since it would adopt as federal law a rule based on state concealed carry laws as those state laws evolved. One can understand why such a law would pose a more serious non-delegation challenge than its static incorporation predecessors, since it would be impossible for a court to uphold it on the theory that Congress had essentially simply copied into the U.S. Code the actual state laws that it wished to incorporate.

Despite this more troubling feature, in *United States v. Sharpnack*¹⁸⁸ the Court rejected a non-delegation challenge to the dynamic assimilative crimes law. Interestingly—especially for the standard story about the non-delegation doctrine becoming moribund after 1935—two justices would have held the federal law invalid on non-delegation grounds.¹⁸⁹ The majority, speaking through Justice Burton, explained that, despite its dynamic incorporation of state law, the federal statute nevertheless reflected a congressional policy—namely, that federal enclaves be governed by the same criminal law as the surrounding states, except as that state law might be superseded by particular federal criminal prohibitions. In his opinion, Justice Burton relied heavily on the history of such assimilative crimes laws, which he said reflected a consistent congressional policy to that effect, and

187. *Franklin v. United States*, 216 U.S. 559, 569 (1910).

188. 355 U.S. 286 (1958).

189. *See id.* at 297 (Douglas, J., joined by Black, J.).

concluded that the dynamic statute challenged in *Sharpnack* merely carried forth that policy more efficiently.

A moment's reflection makes clear that many federal laws incorporate state law, and, indeed, do so dynamically. As examples, Social Security law uses state law definitions of marriage and the Federal Tort Claims Act subjects the United States to legal liability based on the tort law of the state in which the tort occurred.¹⁹⁰ Such laws have not triggered serious non-delegation challenges. Perhaps most ironically, one of the 1935 non-delegation cases, *Panama Refining v. Ryan*,¹⁹¹ authorized the President to prohibit the interstate shipment of oil that was extracted or removed from storage in excess of state law quotas. While *Panama Refining* struck down that authority as a violation of the non-delegation doctrine, the reason was not the state law-foundation for the conduct Congress authorized the President to take.¹⁹²

Nevertheless, important differences would distinguish a CCR law from these latter examples, and even from the dynamic assimilative crimes statute. Most significantly, these other laws' incorporation of state law all relate in some way to the state whose law is being incorporated. Crimes on a federal enclave in South Dakota are governed by South Dakota law, a tort committed by a federal entity in Texas is governed by Texas law, and a retired couple in Connecticut are married for Social Security purposes if Connecticut recognizes their marriage. By contrast, the federal reciprocal concealed carry law adopts state laws for the purpose of making those laws applicable nationwide.

b. Incorporation or Delegation?

This nationwide effect might be an odd feature of a CCR law, but why should it matter for non-delegation purposes? It matters because Congress is the national law-maker. These other instances of federal incorporation of state law do not authorize any state to make law with nationwide effect. Under the assimilative crimes act, a crime on a federal enclave in South Dakota may be governed by South Dakota, but a crime on a federal enclave in North Dakota is not. Similarly, if Connecticut recognizes marriages between first cousins, then such a pairing living in Hartford would be eligible for Social Security survivor benefits, but if Massachusetts does not recognize

190. *Sharpnack*, 355 U.S. at 295; see also *id.* at 297 (more examples extant as of 1958).

191. 293 U.S. 388 (1935).

192. See *id.* at 414–30.

such marriages, then an analogous pairing in Boston would not.¹⁹³ By contrast, under a CCR law, a holder of a concealed carry permit issued by Vermont may take that permit into New York and insist that New York recognize it. National law is thus made by one state.

In turn, this feature of a CCR law matters for a reason that goes to both the theoretical foundation of the non-delegation principle, and the relationship between federal and state power. Federalizing any rule that a state may wish to make, with no federally-imposed substantive standards guiding that rule, allows one state to make rules applicable beyond its borders. This violates the constitutional principle implicit in the non-delegation doctrine—and, indeed, more generally in the republican character of the federal government—that federal law must be made through a process that features representation of all of the people.

Delegations to states to make policy binding on other states violate that principle. This is not an indictment of the motives of state lawmakers. Both in the gun context and beyond, local or regional needs may vary greatly,¹⁹⁴ and lawmakers crafting legislation, such as a concealed carry regime, are presumably responding to the unique needs of their own constituents. Almost by definition, authorizing the most permissive state to foist its rules onto every other state thus constitutes national-level lawmaking that does not take the full national polity's interests into account, either as a matter of process or likely ultimate result.¹⁹⁵

c. The Private Delegation Analogy

Supreme Court delegation doctrine acknowledges this concern. In *Carter v. Carter Coal*,¹⁹⁶ the Court struck down, partly¹⁹⁷ on non-delegation grounds, the part of the Bituminous Coal Conservation Act of 1935 that authorized producers of two-thirds of the coal in a given district to set the minimum wage for coal miners for all mines in that district. Writing for five justices, Justice Sutherland condemned this provision as “delegation in its most obnoxious form,” because “it [was] not even delegation to an official

193. See also *Cooley v. Board of Wardens*, 53 U.S. 299 (1852) (upholding a federal law that incorporated dynamic state-law standards regarding navigation pilotage, but only as those standards applied to the ports of the particular state imposing those standards).

194. See generally Joseph Blocher, *Firearm Localism*, 123 YALE L.J. 82 (2013).

195. See Norman Williams, *Why Congress May Not ‘Overrule’ the Dormant Commerce Clause*, 53 UCLA L. REV. 153 (2005) (concluding that delegations of interstate commerce regulatory power to states is closer to historically disfavored attempts to delegate such power to private parties than it is to the assertion of such power by Congress itself).

196. 298 U.S. 238 (1936).

197. The Court also held that the law exceeded Congress's power under the Commerce Clause. See *id.* at 297–310.

or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business.”¹⁹⁸

To be sure, it is easy to dismiss the modern relevance of *Carter Coal*, given its status as a final expression of the pre-1937 Court’s hostility to federal regulation of the economy.¹⁹⁹ Still, Chief Justice Hughes, who wrote the opinion that signaled the switch to a broader federal commerce power,²⁰⁰ wrote a concurrence in *Carter Coal* that agreed with the majority’s non-delegation analysis,²⁰¹ while Justice Cardozo, joined by Justices Brandeis and Stone, declined to reach the non-delegation question.²⁰² Moreover, when Congress legislated in analogous areas immediately after *Carter Coal*, including a second attempt at regulating coal mining itself, it crafted regulatory regimes that were careful to place ultimate regulatory power with the relevant federal agency, even if producers and other market participants retained a role in the process.²⁰³ When the Court upheld these provisions, it

198. *Carter Coal*, 298 U.S. at 311. Chief Justice Hughes concurred with this part of the result, *id.* at 317, 318 (separate opinion of Hughes, C.J.). Justice Cardozo, joined by Justices Brandeis and Stone, did not reach this issue, as he considered the challenge to this provision to be premature. *Id.* at 324 (Cardozo, J., dissenting in part and concurring in part).

Justice Sutherland’s criticism of such private delegations reveals what one might understand as the mirror image of the concern, expressed in the text, *see* text accompanying *supra* notes 193-195, about national law being made by national authorities. Justice Sutherland contrasted the private lawmaking he condemned in *Carter Coal* to law made “by an official or an official body, presumptively disinterested.” *Id.* In doing so, he condemned that provision in the coal statute as a violation of due process. *See* 298 U.S. at 311. His citation of due process is striking, until one remembers the anti-class legislation tradition that animated much of the pre-1937 Court’s thinking. *See generally* Melissa Saunders, *Equal Protection, Class Legislation, and Colorblindness*, 96 MICH. L. REV. 245 (1997) (discussing class legislation); WILLIAM D. ARAIZA, *ANIMUS: A BRIEF INTRODUCTION TO BIAS IN THE LAW* 11–28 (2017) (same). A classic definition of class legislation was legislation that aimed not at furthering the public interest, but benefitting one private group. *See, e.g.,* *Barbier v. Connolly*, 113 U.S. 27, 31, 32 (1884) (“Special burdens are often necessary for general benefits Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not [prohibited by the Fourteenth Amendment].”). One can easily understand how a grant of power to a private individual, “presumptively [i]nterested,” would run afoul of the class legislation principle and thus of the Due Process Clause. *Carter Coal*, 298 U.S. at 311 (noting how some coal producers might favor the contents of the coal code promulgated by a discrete set of private coal interests, while others might not).

199. *See, e.g.,* *United States v. Darby*, 312 U.S. 100, 123 (1941) (recognizing that *Carter Coal*’s Commerce Clause analysis had been limited by intervening cases).

200. *National Labor Relations Bd. v. Jones & Laughlin Steel Co.*, 301 U.S. 1 (1937).

201. *See supra* text accompanying note 198.

202. *See id.*

203. *See* *United States v. Rock-Royal Cooperative*, 307 U.S. 533, 577 (1939) (explaining the analogous provisions of the Agricultural Marketing Act of 1937); *see* *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 340, 397–99 (1940) (explaining the analogous provisions of the

was careful to distinguish the delegation to private parties that was struck down in *Carter Coal*, rather than simply overruling that earlier case.²⁰⁴ Congress's reaction to *Carter Coal*, and the Court's approving reply, at least suggests a constitutional settlement disfavoring, if not out-and-out prohibiting, delegations of federal regulatory power to private persons.²⁰⁵

d. *The Analogy Between Private and State Delegations*

Of course, *Carter Coal* and its progeny, whatever we may make of them today, involved delegations of federal power to *private* persons. CCR legislation involves a delegation of federal power to states. Nevertheless, these judicial condemnations of private delegations reflect the same concerns that arise with delegations of nationally-scoped federal power to states.²⁰⁶ In

Bituminous Coal Act of 1937); *id.* at 387 (noting that the 1937 law was enacted in response to the Court's decision in *Carter Coal*).

204. See *Sunshine Anthracite*, 310 U.S. at 399 (rejecting a non-delegation challenge to the analogous provisions of the 1937 coal statute by citing *Curran v. Wallace*, 306 U.S. 1, 15–6 (1939), which itself had upheld analogous provisions in a tobacco marketing statute by concluding that those provisions vested regulatory power with the federal agency even if marketers played a role in the regulatory approval process, and which also distinguished *Carter Coal* on this ground); see *Rock-Royal*, 307 U.S. at 507–08 (similarly relying on *Curran* to reject a non-delegation challenge to an analogous provision in an agricultural marketing statute).

205. See, e.g., Sunstein, “Nondelegation Canons,” *supra* note 183. It must be conceded that the Court took that same tack with regard to *Carter Coal*'s Commerce Clause analysis (that is, distinguishing it rather than overruling it), even if by then the Court had clearly moved on to a different conception of the commerce power. See *Darby*, 312 U.S. at 123 (“So far as *Carter v. Carter Coal Co.* is inconsistent with this conclusion, its doctrine is limited in principle by the decisions under the Sherman Act and the National Labor Relations Act, which we have cited and which we follow.”) (citation omitted). Nevertheless, *Carter Coal*'s non-delegation principle has survived in a way that its commerce power analysis has not. See, e.g., *Boerschig v. Trans-Pecos Pipeline L.L.C.*, 872 F.3d 701, 707 (5th Cir. 2017) (“Although th[e] so-called ‘private nondelegation’ doctrine has been largely dormant in the years since [the early decades of the Twentieth century], its continuing force is generally accepted.”); see also *Department of Transp. v. Association of American Railroads*, 135 S. Ct. 1225, 1234, 1238 (2015) (Alito, J., concurring) (“By any measure, handing off regulatory power to a private entity is ‘legislative delegation in its most obnoxious form.’”) (quoting *Carter Coal*, 298 U.S. at 311).

206. Certainly, it is true that many cooperative federalism programs, for example, involving environmental law, authorize a state role in the federal regulatory process. See *New York v. United States*, 505 U.S. 144, 167 (1992) (explaining the concept of cooperative federalism). These authorizations may not constitute “delegations” in the strict sense. See, e.g., Williams, *supra* note 195, at 221 (“Congress’s pursuit of a cooperative, regulatory federalism may not involve the delegation of federal authority at all but simply the enlistment of the states’ voluntary use of their own residual state authority in aid of federal regulatory goals.”)

Congress routinely enlists states, tribes, and even private individuals in implementing federal regulatory programs, thereby suggesting that the modern constitutional order permits the sharing of federal legislative authority. One must be careful, however, before drawing too definitive or categorical a conclusion. The

both cases, power and control are divorced—power is granted to regulate persons who in turn exercise no control over their regulators.²⁰⁷ In such cases, the regulators are unaccountable to the persons they regulate.²⁰⁸

This principle of accountability underlies the non-delegation doctrine.²⁰⁹ But it applies more generally throughout American constitutional law. It underlies a variety of canonical federalism concepts, indeed, including the anti-commandeering doctrine.²¹⁰ Even more relevantly for our current purposes, it underlies foundational doctrine in areas as disparate as inter-governmental tax immunity²¹¹ and the dormant Commerce Clause,²¹² both of which deal with the problem posed by CCR legislation—that is, the problem of one state attempting to foist its regulatory choices onto the rest of the nation. However one views the problem—as one of congressional evasion of accountability when it enacts overly-broad

Court's use of delegation-sounding terminology may be thoughtless and therefore misleading.

Id. at 220–21.

But even if one considers such cooperative federalism programs a species of federal delegation to states, the delegation remains geographically limited, given that under these programs the state gains authority to regulate its own citizens within its own territory.

207. *Cf. Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 746 (D.C.D.C. 1971) (“Concepts of control and accountability define the constitutional [non-delegation] requirement.”).

208. Whether this analogy carries so far as to condemn delegation of nationally-scoped federal regulatory power to states as a violation of due process, *see Carter Coal*, 298 U.S. at 311, or whether the violation remains “simply” one of the non-delegation principle itself, is an interesting question that this Article brackets.

209. *See supra* text accompanying note 207.

210. *See, e.g., New York v. United States*, 505 U.S. 144, 169 (1992) (“Accountability is . . . diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation.”).

211. *See McCulloch v. Maryland*, 17 U.S. 316 (1819) (expressing concern about recognizing a state's power to tax, and thus at least theoretically to destroy, a federal instrumentality which is the product of the entire nation's regulatory choice); *see also* LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 6-30 at 512 (2d ed. 1988) (“Operation of a federal instrumentality necessarily affects the interests of all since it is for the benefit of all; the national power must therefore remain unfettered if control and representation are to be coincident.”) (citing, *inter alia*, *McCulloch*, 17 U.S. at 435–36).

212. *See South Carolina State Highway Dept. v. Barnwell Brothers*, 303 U.S. 177, 184 n.2 (1938) (singling out for special concern state regulations affecting interstate commerce “whose purpose or effect is to gain for those within the state an advantage at the expense of those without, or to burden those out of the state without any corresponding advantage to those within” on the theory that “that when the regulation is of such a character that its burden falls principally upon those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state”). Indeed, after this quote, the Court cited the page from *Cooley* in which the Court expressed confidence that local pilotage requirements, since they impose burdens on merchants using that port, can be expected to be kept to the minimum necessary to satisfy the legitimate needs underlying such requirements. *See id.* (citing *Cooley v. Board of Wardens*, 53 U.S. 299, 315 (1851)).

statutes,²¹³ federal evasion of accountability when it imposes regulatory burdens on state governments,²¹⁴ state evasion of accountability when it burdens federal instrumentalities²¹⁵ or interstate commerce,²¹⁶ or arbitrary (that is, non-public regarding) action more generally²¹⁷—there emerges the unifying theme of the problem caused by an asymmetrical relationship between power over persons and those persons' control over those who wield that power.

None of this analysis casts doubt on a truly national decision-making process yielding a decision to adopt and thus effectively nationalize one state's rule. Thus, for example, Congress could adopt, copy or even incorporate by reference the standards under Vermont law for a concealed carry permit, and make those standards federal law, applicable nationwide. But CCR legislation does not do this. Instead, it adopts the standards of an individual state and makes them applicable nationwide. When it does that it turns over the power to bind all of the American people to the people of one given state.²¹⁸

As noted earlier, some federal laws, such as the modern Assimilative Crimes Act, do bind federal law to the ongoing policy and legal decisions made by the people of one state. But such laws do so in a much more geographically limited way, in a context in which Congress may well have a legitimate interest in incorporating that state's law—for example, by applying that state's law to apply on federal enclaves within that state or applying that state's law to tort claims against the federal government arising out of alleged torts occurring in that state. By contrast, abdicating the power to make nationwide law—law for all of the American people—to any one state violates the very idea of a national legislature that draws its authority from all the American people and that alone has the authority to legislate in the name of the American people. If “concepts of control and accountability” underlie the non-delegation doctrine,²¹⁹ then such control, and surely such accountability, is just as decisively lost when Congress delegates power to a state to legislate for the nation as it is when Congress delegates lawmaking authority to a private party.

213. See *infra* text accompanying notes 220-221.

214. See *supra* text accompanying note 210.

215. See *supra* text accompanying note 211.

216. See *supra* text accompanying note 212.

217. See *supra* text accompanying note 198.

218. This problem is not cured by making the standards of each and every individual state applicable nationwide, because each state's standards, as implemented through each state's concealed carry permitting decisions, are created by that state's polity and only that state's polity. See text accompanying *supra* notes 206-208.

219. *Amalgamated Meat Cutters v. Connally*, 337 F. Supp. 737, 746 (D.D.C. 1971).

2. *Reciprocity as the Lack of a Standard*

This conclusion leads to the second, closely-related, reason a CCR law should be understood as raising serious non-delegation concerns: the lack of standards. As noted at the end of the previous section, Congress could easily and legitimately decide that one particular state's standard or rule governing certain conduct should be nationalized. Since it could enact that state rule by copying the relevant language from the state code, there's no reason it could not incorporate that language by reference. But in doing so, the federal law would be enacting a discernable legal standard. Even if that standard was vague (for example, because the state law being copied was vague), the resulting federal law would still be subject only to the deferential scrutiny modern non-delegation jurisprudence demands.²²⁰

But Congress's wholesale incorporation of any and all standards adopted by states, and its elevation of those state standards to rules of nationwide applicability (rather than rules governing the relationship of the federal government and federal programs to a given state) is different. Such a congressional decision reflects no choice at all about what substantive standards should govern concealed firearms carry nationwide. Thus, this is not a situation where Congress enacts standards, which are then challenged as too vague. That latter situation triggers the well-known critique that courts lack the capacity to distinguish between legislative standards that may be vague but are sufficiently determinate to state an "intelligible principle" and those that are simply too vague to tolerate. By contrast, CCR legislation simply abdicates the task of enacting any standards at all.²²¹ Indeed, one way of describing it is as a literal delegation of the lawmaking task, rather than the specification of an admittedly-vague standard whose application by an entity other than Congress might be considered either (illegitimate) lawmaking or (legitimate) administration.²²²

220. Cf. *Department of Transp. v. Ass'n. of American Railroads*, 135 S. Ct. 1234, 1238 (2015) (Alito, J., concurring) (distinguishing congressional delegation of power to a federal instrumentality, for which some justification might be sufficient, with delegation of that power to a private party, for which "there is not even a fig leaf of constitutional justification").

221. *Id.* at 1234, 1238 (Alito, J., concurring) (drawing a similar distinction). The requirements in the CCR bill—that the person hold a valid ID and a valid concealed carry permit (or be eligible to do so in the person's home state), and be qualified under federal law to possess, transport, or receive a firearm under federal law, do not change this conclusion, as they still leave to each state the discretion to decide who is eligible to possess a permit, with no standards governing those choices. In particular, the requirement that the individual be eligible to possess a firearm under federal law is presumably intended simply to protect the integrity of existing federal law—that is, to prevent the holder of a concealed permit to use the federal concealed carry right to defeat any other federally-imposed restriction on that person's possession of a firearm.

222. Cf. *Mistretta v. United States*, 488 U.S. 361, 420 (Scalia, J., dissenting) (concluding that the federal law delegating power to the U.S. Sentencing Commission to promulgate sentencing

Does this analysis mean that Congress is powerless to legislate nationwide reciprocity on any topic? Not necessarily. As long as a federal law provided minimal substantive standards for such reciprocity, then it's possible that such a law would survive non-delegation scrutiny. In that case, those minimal standards would reveal the substantive choices Congress made about the relevant regulatory issue. But "pure" reciprocity does not itself reflect a substantive policy. Such a policy "choice" would be better understood as a complete abdication of the obligation to make a choice.

To illustrate this final point, consider that a federal "policy" of pure reciprocity can be analogized to a federal policy that whatever Arizona chooses with regard to concealed carry will be national policy. The only difference between this "policy" and the CCR bill is that the latter enshrines a policy in which the choices of the 49 other states, rather than just Arizona's, becomes binding on every state. Just as a federal "policy" to make Arizona's choices national law is no federal policy at all, but an abdication of policy-making power to the Arizona legislature, so too making the choices of each state national policy, each binding on all the others, reflects no meaningful federal policy choice. If abdication to Arizona violates the non-delegation principle, then abdication to each of the 50 states does as well—50 times over.

Conclusion

Concealed carry reciprocity is a novel concept. Of course, that novelty does not necessarily count against its constitutionality;²²³ as Chief Justice Roberts observed when evaluating the constitutionality of what he viewed as the novel regulatory expedient of compelling Americans to participate in interstate commerce, "there is a first time for everything."²²⁴ On the other hand, in the very next sentence in his opinion he stated, "[b]ut sometimes the

guidelines was "a pure delegation of legislative power" because that delegated power did not come with any authority either to administer the statute or adjudicate claims under it). To be sure, Justice Scalia's argument in *Mistretta* is slightly different from the one made here. Justice Scalia's concern, at least in part, was that the delegation of power to the Commission did not come with any accompanying mandate to administer the statute or adjudicate claims under it. Thus, that delegation could not be described as a delegation of quasi-executive or quasi-judicial power—hence, his description of the law as a delegation of "pure" legislative power. Whether the CCR bill's delegation could be similarly described is a complex question, in light of the fact that, on the one hand, states would remain responsible for administering their concealed carry regimes but, on the other, that administration would remain administration of a state rather than a federal program.

223. *But see* *Printz v. United States*, 521 U.S. 898, 905 (1997) ("if . . . earlier Congresses avoided use of this highly attractive power [to conscript state officials to enforce federal law], we would have reason to believe that the power was thought not to exist").

224. *National Fed. of Indep. Businesses v. Sebelius*, 567 U.S. 519, 549 (2012).

most telling indication of [a] severe constitutional problem . . . is the lack of historical precedent for Congress's action."²²⁵

In the case of concealed carry reciprocity, the most that can be said at this point is that the constitutional authority for such novel legislation is far from settled, despite the obvious candidates this Article has preliminarily canvassed.²²⁶ Moreover, such legislation raises serious questions about whether it transgresses important constitutional limitations.²²⁷ This Article's analysis suggests that the ultimate fate of this regulatory experiment is already seriously clouded, even before it has been enacted.

225. *Sebelius*, 567 U.S. at 549 (internal quotation omitted; brackets in original).

226. *See supra* Part II.

227. *See supra* Part III.
